82-1113

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DUNCANSON-HARRELSON COMPANY

and

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WAUSAU

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

NANCY A. FREER, WIDOW OF DAVID W. FREER,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the inclusion of employer contributions to union pension and welfare funds within an employee's "average weekly wage" under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") would defeat the clear intent of the Act to ensure prompt and certain recovery for industrial injuries, and result in endless litigation of earnings issues on a case by case basis.

2. Whether the Court of Appeals' judicial expansion of the definition of wages should be reversed as contrary to both legislative history and prior judicial interpretation.

3. Whether compensation benefits in excess of actual take-home pay would be contrary to the Act's purpose of both encouraging return to productive status and maintaining a similar standard of living after injury.

LIST OF PARTIES*

The parties in case No. 79-7093 before the Court of Appeals for the Ninth Circuit were Nancy A. Freer, widow of David W. Freer, as claimant/real party in interest, Duncanson-Harrelson Company ("Duncanson-Harrelson") and Employers Mutual Liability Insurance Company of Wausau ("Employers") as petitioners and Director, Office of Workers' Compensation Programs, U.S. Department of Labor as respondent. The parties in case no. 79-7094 were Nancy A. Freer as petitioner and U.S. Department of Labor, Office of Workers' Compensation Programs as respondent.

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* Petitioner, Duncanson-Harrelson Company, reports, pursuant to Rule 28(1) of the Rules of this Court, that Duncanson-Harrelson Company is the parent company, with no subsidiaries. Affiliate companies not wholly-owned include: S.D.M. Associates, a partnership, and Strike and Blackmer Company, a partnership.

Employers Insurance of Wausau, a Mutual Company, owns Wausau Service Corporation which is the parent company with subsidiary companies with are all wholly-owned. Affiliate companies which are not wholly-owned include: Wausau County Mutual Insurance Company and Wausau Lloyds, Texas Lloyds Association.

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Petitioners Duncanson-Harrelson Company ("Duncanson-Harrelson") and Employers Mutual Liability Insurance Company of Wausau ("Employers") pray that a Writ of Certiorari issue to review a judgment of the U.S. Court of Appeals for the Ninth Circuit which included employer contributions to union pension and welfare funds as "wages" for purposes of calculating compensation due as death benefits under the Longshoremen's and Harbor Workers' Compensation Act.

OPINIONS BELOW

The Decision and Order of the Administrative Law Judge (No. 76-LHCA-266) issued July 14, 1976, is not reported but appears as Appendix D (App. 32a) hereto. The Order of the Benefits Review Board (Nos. 76-314, 314A) dated January 31, 1979, is reported at 9 BRBS 888 and appears as Appendix C (App. 19a) hereto. The opinion of the U.S. Court of Appeals for the Ninth Circuit (Nos. 79-7093, 79-7094) dated September 14, 1982, from which Certiorari is sought, is reported at 686 F.2d 1336 and appears as Appendix B (App. 2a) hereto. The order of the Court of Appeals denying a Petition for Rehearing, dated November 12, 1982, is not reported but appears as Appendix A (App. 1a) hereto.

JURISDICTION

The Court of Appeals' decision in these cases was rendered on September 14, 1982 (App. 2a). A timely Petition for Rehearing was filed on September 27, 1982, and denied on November 12, 1982 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

The relevant statutory provisions are set forth as Appendix E (App. 53a) hereto.

STATEMENT OF THE CASE

The appeal by petitioners and cross-appeal by respondent were consolidated in the U. S. Court of Appeals for the Ninth Circuit. The issue presented herein arises by virtue of respondent's cross-appeal.

The case arises from the death of David W. Freer during the course of his employment with petitioner Duncanson-Harrelson Company ("Duncanson-Harrelson"). At the time of his death, Freer was covered by the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq. ("LHWCA"). Under Section 9(e) of the LHWCA [33 U.S.C. § 909(e)] (App. 53a), death benefits are computed by reference to the "average weekly wage" of the deceased employee on an annualized basis. The Administrative Law Judge determined Freer's average weekly wage pursuant to Section 10(c) of the Act by reference to his previous earnings. The Ninth Circuit Court of Appeals affirmed the Administrative Law Judge's application of § 10(c). Freer was a member of Local 34 of the Piledrivers, Carpenters, Bridge, Wharf and Dock Builders Union of Northern California. The collective bargaining agreement between that union and Freer's employer required, among other things, that the employer pay certain sums of money into four union trust funds for each hour worked by each employee; namely, a health and welfare fund received 60 cents before September 1, 1975 and 74 cents thereafter; a vacation and holiday plan received 75 cents per hour effective May 1, 1972; an apprenticeship plan received 2 cents per hour which was increased to 4 cents per hour effective on and after September 1, 1974 and a 6 cents per hour on and after January 1, 1976.

Sections VII A & C of the collective bargaining agreement referring to the Health and Welfare Plan and the Pension Plan state that "For the purposes of interpreting and applying this Section, such Trust Fund contributions shall not be considered as compensation."

Respondent Freer argued before the Administrative Law Judge that these payments to the Union Trust Funds should be included in the determination of "average weekly wages" for

the purpose of calculating death benefits to be paid by Duncanson-Harrelson. Stating that there is no legal precedent for the inclusion of fringe benefits in determining average weekly wages, the Administrative Law Judge ruled that pension trust fund benefits, by their nature, were not capable of being converted to the immediate advantage of the employee and were not a "similar advantage" to "board, rent, housing, lodging" within the meaning of Section 2(13) (App. 48a, 49a & 53a). The Benefits Review Board affirmed the Administrative Law Judge's decision and rejected Freer's contentions that employer contributions to Union Trust Funds should be included in the calculation of the employee's average weekly wage. (App. 23a-24a)

In so ruling, the Board reaffirmed its holding in *Collins* v. *Todd Shipyards Corp.*, 5 BRBS 334, BRB No. 76-177 (January 5, 1977), wherein it concluded the employer's contributions to a union trust fund were not considered in determining the employee's average weekly wage. The Board in *Freer, supra,* stated:

> Unlike payments for overtime and for vacations, which are payments that the employee has already earned and is entitled to enjoy, the benefits from payments to health and pension funds are directly contingent upon the occurrence of a future event that may or may not happen. Until the occurrence of this event, the employee has no entitlement to these benefits. Furthermore, should the event that triggers the entitlement to health or pension benefits never occur, it depends upon the particular benefit plan and the terms of the applicable labor contract whether the employee receives any amounts from the plan. Thus such "fringe benefits" as health and pension plans are too speculative to be included in a computation of one's average wage. (App. 23a)

In so finding, the Board observed that,

> [I]nclusion of benefits, such as health and pension, in the computation of average weekly wage may result in the payment of excessive benefits to the employee. With many benefit programs, an employer only contributes and an

employee is only qualified to participate in the programs so long as the employee is employed with the employer. (App. 23a)

The Board also noted that if the employee was not injured, the entitlement to amounts in a benefit program would only have continued until his or her retirement or death. If fringe benefits were included within the determination of average weekly wage after the point when the employee would have retired or died, the employee or his survivors would receive workers' compensation benefits which included amounts to which the employee would not have been entitled had the injury not occurred.

Respondent's proposal to include fringe benefits would result in compensation benefits far in excess of workers' compensation levels. If employer contributions are added to salary and the employee is injured after he becomes eligible for fringe benefits, he will receive fringe benefits as well as workers' compensation payments which have already included the fringe benefits. Thus, he receives a double recovery. The resulting duplication of benefits would encourage employers to bargain for reduced pension benefits. This virtually eliminates an employee's pension rights despite years of contribution.

Claimant appealed this ruling to the U. S. Court of Appeals for the Ninth Circuit, which reversed the BRB and held in accordance with *Hilyer* v. *Morrison-Knudsen Construction Company*, 670 F.2d 208 (D.C. Cir. 1981), that "the Act's definition of 'wages' includes the values received from the employer that are easily identifiable and calculable" and that Congress intended a flexible definition of "wages" under the Act. (App. 15a). In so ruling, the Court purported to interpret "wages" which is defined as follows in Section 2(13) of the LHWCA, [33 U.S.C. § 902(13)]:

> (13)"Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employers, and gratuities received in the course of employment from others than the employer.

STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

Both Duncanson-Harrelson and its insurer, petitioner Employers Mutual Liability Insurance Company of Wausau ("Employers"), opposed the definition of "wages" adopted by the Court of Appeals before the Administrative Law Judge, the Benefits Review Board and the Court of Appeals. All three bodies specifically ruled upon the issues raised in this Petition (App. 48a-49a, 23a-24a, 13a-18a).

BASIS FOR FEDERAL JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to pass upon the Court of Appeals' interpretation of Sections 2(13) of the LHWCA.

ARGUMENT

In contradiction to the plain meaning of 33 U.S.C. § 902(13) and despite 54 years of consistent administrative interpretation, the District of Columbia Circuit in *Hilyer* v. *Morrison-Knudsen Construction Company and Argonaut Insurance Company*, 670 F.2d 208 (D.C. Cir. 1981), and now the Ninth Circuit in the case at Bar, have decided that an employer's payments into union trust funds, which may or may not accrue to the benefit of a particular employee, are readily identifiable and calculable and should be included in the calculation of an employee's average weekly wage. The potential confusion and complexity involved in determining the types and amounts of applicable benefits will have a catastrophic impact upon the Department of Labor's administration of the LHWCA and the federal courts. The result will be to entirely defeat a primary goal of the workers' compensation system, to affect a *prompt and certain recovery* of benefits in the case of deceased employees and to compensate a surviving spouse so that he or she may maintain the standard of living lost by reason of the employee's death.

1. Awarding Compensation Benefits in Excess of Take-Home Pay Would be Contrary to the Act's Purpose of Both Encouraging Return to Productive Status and Maintaining a Similar Standard of Living After Injury.[1]

The Comptroller General demonstrated that most workers *now* receive benefits averaging about 88% of pre-injury take-home pay.[2] The Ninth Circuit Court of Appeals' decision below involved pension contributions of between $.80 and $1.25 per hour, 10% to 15% of Mr. Freer's apparent hourly wage. The pension and health and welfare contributions required by the contracts governing longshore labor now exceed $4.00 per hour, more than one-third of the "straight-time" hourly wage. The average worker's "voluntary fringe benefits" package equals about 28% of actual payroll.[3]

The Department of Labor estimates that by 1981, 905,000 employees were covered by the Act, an increase of over 100,000 since 1972. The number of reported injuries has increased from roughly 72,000 in 1972 to 238,000 in fiscal year 1980 and 251,000 in 1981, with numbered cases in which employees have actually lost time from work because of disability increasing from over 17,000 in 1972 to 59,000 and 61,000 in 1980 and 1981, respectively.[4]

It has been estimated that nearly 200 million dollars were paid as compensation in death benefits during 1980. Inclusion of pension contributions and other similar fringe benefits as "wages" would have increased the total by nearly 20 million

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[1] Larson, Workman's Compensation Law § 2.50, page 11-12 (1964)

[2] Longshore Act: Average Weekly Benefit Received Under Current Method and Alternative Methods, Expressed as a Percentage of Take-Home Pay for Selected Wage Intervals of Employees with 2.5 Federal Exemptions in State with Graduated Income Taxes, closed cases.

[3] Chamber of Commerce of the United States, *Employee Benefits, 1980*, p. 8 (1981). Payments Required by Statute (FICA, unemployment compensation fund, etc.) were excluded from this figure.

[4] Comptroller General's Report at 5; United States Department of Labor, 1983, Budget Justification of Appropriation Estimates for the Committee on Appropriation (January 1982), ESA-33, (Table II of Longshoremen's and Harbor Workers' Compensation Act Workload Statistics, FY1981-FY1983).

dollars for that year alone and will force a similar increase in the estimates of future exposures and the costs of providing LHWCA protection in all future years.[5]

It is staggering to realize that potentially workers would likely receive compensation benefits which *exceed* actual take-home pay. This will effectively eliminate any economic incentive to resume productive employment. Benefit levels which approach or equal full take-home pay minimize return-to-work incentives and delay the return to productive employment. Benefit levels which *exceed* take-home pay encourage exaggeration and malingering.[6]

The impact of including fringe benefit contributions equalling 15% and 30% of "gross pay" is shown on the following table:

Average Wage (Selected Intervals)	Percent of Total Cases	Percent of Take-Home Pay Replaced by Compensation	
		15% Fringe Benefit Package	30% Fringe Benefit Package
$ 1— 50	0.38	129%	146%
51—100	2.48	127%	143%
101—150	11.26	131%	148%
151—200	12.02	100%	113%
201—250	16.60	95%	108%
251—300	18.51	98%	111%
301—350	12.40	100%	113%
351—400	10.31	102%	116%
401—450	4.96	105%	118%
451—500	3.24	107%	121%
501—550	2.86	110%	125%
551—600	1.91	113%	127%
601—650	1.34	115%	130%
651—700	0.57	117%	133%
701—750	0.76	120%	135%
751—800	0.38	122%	138%

[5] Brief of amicus curiae of Master Contracting Stevedore Association of the Pacific Coast, representing twenty-six stevedore companies filed in *Duncanson-Harrelson Company and Employers Mutual Liability Insurance Company of Wausau* vs. *Director, Office of Workers Compensation Programs, U.S. Department of Labor, and Nancy A. Freer*, 686 F.2d 1336 (9th Cir. 1982).

[6] *Larsen, Workmen's Compensation Law* § 2.50, page 11-12 (1964).

The table proves that inclusion of fringe benefits as "wages" will vastly increase the number of workers who receive more for not working than for labor performed. For all but a relatively few workers, all economic incentive to resume employment will be erased. Inclusion of fringe benefits will increase the typical workers' compensation award to a level nearly 20% greater than the amount taken home for a full week of productive work.

In essence, when the predicted trust fund contributions cause the average weekly wage to exceed take-home pay, the benefits received will more closely resemble a tort recovery than the receipt of workers' compensation benefits. While a tort recovery seeks to reimburse the plaintiff on a dollar for dollar basis, the goal of the workers' compensation system is to allow an injured worker to maintain his standard of living while encouraging him to return to productive work. Larsen has stated that, "It was never intended that compensation payments should equal actual loss, for the reason, if no other, that such a scale would encourage malingering."[7] This result is unjustifiable.

The purpose of the LHWCA is to maintain the surviving spouse's standard of living which was lost by reason of the death. In order to continue the pre-death standard of living, only tangible items, such as wages, board, and lodging, may be considered. The LHWCA has included within the definition of "wages" such tangible commodities as board, rent, housing, lodging and similar advantages. 33 U.S.C. §902(13) (App. 53a) It could hardly have been an oversight that contingent interests such as union fund benefits were deleted from this list when the value of such benefits far exceeded the named benefits.

As the Benefits Review Board held in *Duncanson-Harrelson Company and Employers Mutual Liability Insurance Company of Wausau* v. *Director OWCP, U.S. Department of Labor and Nancy Freer*, 686 F.2d 1336 (9th Cir. 1982):

> Unlike payments for overtime and for vacations, which are payments that the employee has already earned and is entitled to enjoy, the benefits from payments to health and pension funds are directly contingent upon the occurrence

[7] *Id.* at §2.50, page 11-12.

of a future event that may or may not occur. Until the occurrence of this event, the employee has no entitlement to these benefits. Further, should the event that triggers the entitlement to health or pension benefits never occur, it depends upon the particular benefit plan and the terms of the applicable labor contract whether the employee receives any amount from the plan. Thus, such "fringe benefits" as health and pension plans are too speculative to be included in a computation of one's average wage. *Id.* at 6-7.

The benefits paid by Duncanson-Harrelson into the union trust fund were not "lost" upon the employee's death. Mr. Freer had no right to tell his union how to use the funds nor did he have a vested interest in the funds. Given his lack of control and interest in the fund, Mrs. Freer should not be entitled to recover such benefits.

2. Inclusion of Union Trust Fund Contributions As Wages Would Result in Double Recovery.

The decision below, if upheld, will result in double recovery by the surviving spouse. In the case at bar, the pension plan bought life insurance. Mrs. Freer is receiving the proceeds of the life insurance policy paid by employer contributions. She also claims that employer contributions to the union pension plan should be added to the wage computation to determine average weekly wage. She therefore claims life insurance proceeds and increased workers compensation benefits based upon the single employer contribution to the pension. As in cases where an employer is allowed a lien against an employee's third party recoveries, would the employer receive a lien against amounts paid under the life insurance policy? Would the employer then become no more than a trustee and/or administrator for the employee's life insurance, seeing that payments were timely made and receiving reimbursement upon the employee's death? The inclusion of amounts paid for health and welfare benefits raise similar problems. Should an employee receive union health and welfare benefits in kind, paid for by the employer, while at the same time receive health and welfare contributions in the form of workers' compensation benefits?

In the case of an injured employee who is injured after he is eligible to receive retirement benefits, he or she could receive both pension benefits and workers' compensation benefits. If he receives workers' compensation benefits based upon pension plan contributions by the employer, he would be receiving a double recovery, i.e., increased Workers' Compensation benefits based upon pension plan contributions by the employer. He therefore effectuates a double recovery for the identical employer contribution.

3. Inclusion of Fringe Benefits in Average Weekly Wage Would Cause an Administrative Nightmare and Result in Unequal Treatment of Workers Under the LHWCA.

If the inclusion of pension contributions as "wages" is made retroactive, it will require the re-calculation of benefits payable in hundreds of thousands of cases "closed" since 1972 causing enormous disruption of the LHWCA's administrative system. The amount of "wages" is central to nearly every LHWCA proceeding. Except in those cases involving workers with current annual incomes exceeding $38,000.00, the compensation rate is tied directly to the employee's own weekly "wages".

Administrative determinations of accurate "wages" and the calculation of the appropriate benefit rate are handled in accordance with the Department of Labor's Longshore Procedure Manual. The manual specifically directs the exclusion of pension contributions.[8] About 96 percent of all longshore claims are "resolved" by Deputy Commissioners and their

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[8] Longshore (LHWCA) Procedure Manual, Chapter 1-700, Part 1 Claims/Determination of Average Weekly Wage, October 15, 1976.

1-703. *Annual Earnings.* The average weekly wage is set at one fifty-second part of the employee's average annual earnings so computed. Any one or combination of the following are included in the term wages:

1) Cash wages and salary.
2) Anything of value received as consideration for the work:
   A) Tips and bonuses
   B) Room and Board.
   C) Car allowance (if it exceeds actual travel expense).

(Contributions by the employer to pension and health plans are not included as wages. Refer to LS/HW Program Memorandum No. 32, dated June 17, 1968).

claims examiners. Since 1972, the Deputy Commissioners have had no authority to make *final* determinations of disputed issues. Claims resolved by Deputy Commissioners remained forever open. The amount of "wages" upon which initial compensation rates are based remain forever subject to re-determination. *Intercounty Construction Company* v. *Walter*, 422 U.S. 1 (1975).

Even those claims in which purportedly final orders have been entered remain subject to the Act's "modification" provisions and eligible for re-opening at any time within one year following the date of the last compensation payment in order to permit correction of any "mistake" in a determination of fact. 33 U.S.C. § 922. The Deputy Commissioner's determination of a compensation rate pursuant to an erroneously restricted definition of "wages" would certainly qualify as a "mistake".

A broadening of the traditional definition of "wages" will require the re-opening and re-calculation of the benefits payable in hundreds of thousands of post-1972 cases. The Department of Labor simply cannot perform the tasks involved in that massive effort. The number of injuries has nearly quadrupled since 1974. The Department's claims processing staff has grown by only 47 percent to a total of 147 persons. This staff barely manages its current case load. The administrative staff and structure will collapse under the weight of thousands upon thousands of revised claims. Many companies will fail under the burden of litigation and the subsequent multimillion dollar liabilities.

Compounding the economic impact, insurers will be forced to pay benefits for which no premiums have been collected. Insurers, who had no reason to suspect such an increase in benefits, would have to set new rates in premiums while increasing present reserves. If losses must be paid out of reserves, this could effect the insurer's ability to provide workers' compensation insurance. Rates are currently set based upon payroll, i.e., actual salaries paid. How would insurance companies estimate the costs of various benefits if such benefits are included as wages? The effect of such soaring costs on the national economy, although unknown at this time, can not be minimized.

The Department of Labor will be forced to determine, for each and every day of employment, the exact employer contributions made on that date. Where contributions were increased under a union agreement, the administration would have to calculate the different relevant rates for inclusion into the average weekly wage. Neither the Department of Labor nor claimants can afford the time and expense of hiring actuaries to determine benefit levels.

The decision would also result in disparate awards to workers performing the same jobs but represented by different unions. A teamster's union member and a longshore union member working side by side would receive significantly different benefits for an identical injury. The LHWCA utilizes a schedule which provides for equal benefits for similar work-related injuries. The inclusion of fringe benefits in "wages" would lead to favored treatment of workers represented by more powerful unions. And how would benefits for those not represented by unions be calculated? Although unwilling, would such employees be indirectly forced to join unions?

Another foreseeable result is that employers would structure collective bargaining agreements which would effectively delete pension benefits. For example, a collective bargaining agreement could provide for a pension reduction equal to any workers' compensation benefits received during the same time frame. While not reducing workers' compensation benefits, this would force an employee to forego receiving pension benefits earned over years of employment.

4. The Court of Appeals' Judicial Expansion of the Definition of Wages Should be Reversed As Contrary to Both Legislative History and Prior Judicial Interpretation.

Hundreds of millions of dollars have been paid to hundreds of thousands of workers since the LHWCA's benefit structure was reformed in 1972. These monies were paid on the basic premise, shared by all throughout the LHWCA's history, that the "wages" on which the proper rate of compensation depends do not include employer contributions to trust funds. It is highly significant that Congress has modified various

aspects of the LHWCA since its passage in 1927 but has never seen fit to change the original definition of "wages" in 33 U.S.C. § 902(13).

Interpreting the plain language of the Act, the Court, in *Potomac Electric Power Company* v. *Director, OWCP*, 449 U.S. 268 (1980) stated that the LHWCA was never intended to provide "complete compensation for the wage earner's economic loss". *Id.* at 281. Rather, the purpose was to have "definite" limits assuring a "prompt and certain recovery". *Id.* at 281, 282. The Court stressed that the LHWCA was patterned after the law then in existence in New York. 1922 N.Y. Laws, Ch. 615. The addition of union trust fund payments to the concept of wages was never asserted, attempted, or accomplished under the New York statute. New York case law, as well as federal law, supports the "plain language" approach to legislative interpretation.

The history of the 1972 amendments offers strong proof that the parties to the process were aware of the distinction between included "wages" and excluded "fringes". Indeed, it is clear that the parties based their debate about appropriate benefit levels and their ultimate agreement on the definitional premise that "wages" did not include contribution to pension funds. In *Northeast Marine Terminal Company* v. *Caputo*, 432 U.S. 249 (1977), the Supreme Court identified the three groups whose interest Congress sought to accommodate in 1972.

> The main concern of the Amendments *was not with the scope of coverage* but with accommodating the desires of three interested groups: (1) shipowners who were discontent with the decisions allowing many maritime workers to use the doctrine of "seaworthiness" to recover full damages from shipowners regardless of fault; (2) employers of the longshoremen who, under another judicially created doctrine, could be required to indemnify shipowners and thereby lose the benefit of the intended exclusivity of the compensation remedy; and (3) workers who wanted to improve the benefit schedule deemed inadequate by all parties. *Id.* at 261. (Emphasis added.)

The dispute was between workers and employers and was limited to finding a mutually acceptable ceiling to an increase in the benefit structure for which all acknowledged substantial need.

In reforming the benefit structure, Mr. Ralph Hartman represented the shipbuilding industry and Mr. Howard McGuigan was spokesman for the AFL-CIO. Both representatives thought that benefits should be increased to a level more accurately reflecting "wage" loss. Both distinguished between "wages" and "fringe benefits" in testimony closely pre-dating the Amendments themselves. Mr. McGuigan argued that the current $70 weekly maximum was inadequate when compared to prevailing "wage" levels. Tables specifically excluded contributions to pension plans as part of the "wage" base.[9]

Mr. Hartman's testimony and his exclusion of those same contributions from "wages" was equally explicit.

> . . . Currently, the reported average weekly *wage* in the shipbuilding and ship repair industry approximates $165, which rate *covers straight time, overtime, shift work differentials, vacation and holiday allowances.*
>
> It must be recognized, of course, that *there are additional weekly employer costs* approximating $25 per week *covering other contract related benefits such as non-industrial health and accident insurance, pensions,* and statutory costs, such as Social Security, and state and federal unemployment compensation. These costs continue during disability. (1972 Hearings, *supra* note 9 at 182-183, emphasis added)

The Ninth Circuit decision violates the plain language of the statute. "Wages" are expressly defined in the LHWCA as "the money rate at which the service rendered is recompensed . . . including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities . . . ." The plain meaning of this definition does not encompass employer contributions to benefit

[9] Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92nd Congress, 2nd Session, U.S. Government Printing Office, 1972, pages 99-110.

funds but is restricted to actual payments made directly to the employee or more traditional wage substitutes provided to him, such as room and board.

Fundamentally, it should be understood that when Congress wished to include union fund contributions in the concept of "wages", it has written legislation to accomplish the task. The Davis-Bacon Act, 40 U.S.C. 276 et seq., provides that wages paid on federally funded construction projects should accord with prevailing local wages. In 1964, the Davis-Bacon Act was amended by inserting a definition of "wages" to establish that benefit fund contributions would be considered "wages" for the purposes of the Act. 40 U.S.C. 276a(b). Congress specifically noted that such fringe benefits were rare when the Davis-Bacon Act was enacted in 1931. (S. Rep. No. 963, 88th Cong. 2d Sess. 2 (1964)). Hence, the existing statute did not include fringe benefits and congressional action was necessary to provide for the inclusion of trust fund contributions.

The LHWCA was enacted in 1927 when Congress was cognizant of the rarity of fringe benefits. Congress' failure to amend the LHWCA as part of the 1972 amendments, *as it did the Davis-Bacon Act*, suggests that employer contributions were not intended to be LHWCA "wages". This conclusion is supported by the longstanding administrative interpretation excluding fringe benefits from the average weekly wage.[10] See *J. W. Bateson* v. *United States ex rel Board of Trustees*, 434 U.S. 586 (1978).

In another context, the court in *U.S.* v. *Embassy Restaurant, Inc.* 359 U.S. 29 (1959) held that employer contributions to trust funds for the benefit of employees were not entitled to the priority given by the old bankruptcy act. 11 U.S.C. 104(a)(2) The Court acknowledged that, "Not all types of obligations due employees from their employers are regarded by Congress as being within the concept of wages, even though having some relation to employment". *Id.* at 32. See also *Alabama Power Company* v. *Davis*, 431 U.S. 581 (1977).

[10] Longshore Procedure Manual, *supra*, Footnote 8.

(pension benefits are not like wages for purposes of veterans' seniority rights); *Joint Industry Board* v. *United States*, 391 U.S. 224 (1968) (unpaid contributions to annuity plans are not "wages" under 11 U.S.C. 104(a)(2)).

Practical considerations must be taken into account in evaluating congressional intent under the LHWCA. *Potomac Electric Power Company* v. *Director, OWCP*, *supra*, 449 U.S. at 290. The disruptive effect upon the administration of the LHWCA would be enormous in fulfilling the Act's goal of prompt and certain disposition of benefits. Certainly the fact that a disabled employee or a deceased employee's spouse would receive disability benefits exceeding take-home pay, and the fact that many awards would result in double recovery, could not have been intended by Congress.

Moreover, as in the case of employer training contributions, it makes no sense to include certain benefits in the base for computing post-injury benefits. For example, Duncanson-Harrelson paid 2-6 cents per hour into a union apprenticeship employee plan which was intended to help train new union members and in no way benefitted the injured employee or dependent. As Freer was not an intended beneficiary of this fund, neither he nor his surviving spouse should be entitled to receive its benefits. Further, health and welfare trust funds were used to purchase life insurance. Mrs. Freer is receiving the full benefit of these contributions as the beneficiary of the life insurance policy; there is no need to carry those trust contributions over to LHWCA death benefits because the beneficiary does not have to bear the expense of paying premiums on an insurance policy on David Freer's life.

CONCLUSION

Congress did not intend fringe benefits or contributions to union trust funds to be included within calculation of an employee's average weekly wage under the Longshoremen's and Harbor Workers' Compensation Act. In 1972, Congress had the opportunity to re-define 33 U.S.C. § 902(13) and chose not to expand the definition of "wages" to include fringe benefits. The judiciary should decline to act where Congress has clearly had the opportunity to change the law and has refused to do so. Contrary to the Act's express purpose, inclusion of fringe benefits within average weekly wages would confuse, complicate and delay the awarding of benefits under the Act. We respectfully urge the Court to reverse the result below.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DUNCANSON-HARRELSON COMPANY and EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WAUSAU, *Petitioners,* vs. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, *Respondent,* and NANCY A. FREER, *Claimant.*	FILED NOVEMBER 12, 1982 PHILLIP B. WINBERRY CLERK, U.S. COURT OF APPEALS No. CA 79-7093 No. BRB 76-314
NANCY A. FREER, *Petitioner,* vs. UNITED STATES DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, *Respondent.*	No. CA 79-7094 No. BRB 76-314A

The petition for rehearing of Appellant and Claimant Nancy A. Freer is denied.

APPENDIX B

Nos. 79-7093, 79-7094.

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

DUNCANSON-HARRELSON COMPANY
and EMPLOYERS MUTUAL LIABILITY INSURANCE
COMPANY OF WAUSAU,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR
Respondent,

and

NANCY A. FREER,
Claimant.

NANCY A. FREER,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Respondent.

PETITION TO REVIEW A DECISION OF THE BENEFITS REVIEW BOARD UNITED STATES DEPARTMENT OF LABOR

Argued Dec. 10, 1980.
Submitted April 6, 1982.
Decided Sept. 14, 1982.

B. James Finnegan, San Francisco, Cal., argued, for Duncanson-Harrelson Co., et al.; Kiernan & Finnegan, San Francisco, Cal., on brief.

Lee H. Cliff, San Francisco, Cal., argued, for Freer; W. Martin Tellegen, Hall, Henry, Oliver & McReavy, San Francisco, Cal., on brief.

Mark C. Walters, Washington, D.C., for Director; Mary A. Sheehan, Washington, D.C., on brief.

Petition to Review a Decision of the Benefits Review Board United States Department of Labor.

Before TRASK and ANDERSON, Circuit Judges, and STEPHENS,* District Judge.

TRASK, Circuit Judge:

Claimant Freer challenges the amount of compensation awarded her under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1976) (Act or LHWCA), by the Benefits Review Board (BRB). Freer's husband (the decedent) was employed as a pile driver and was killed over navigable waters while cutting pilings for the construction of a pier. Freer asserts that the Administrative Law Judge (ALJ) and the BRB erred in determining the amount of compensation by applying the wrong subsection of 33 U.S.C. § 910 and by failing to include employer contributions to the union pension and health funds as part of decedent's wages.

Defendants Duncanson-Harrelson Company and its liability insurer (collectively D-H) also appeal urging that the decedent was not covered by the Act. D-H argues alternatively that decedent did not meet the Act's test of coverage or that he belonged to a class of employees specifically excluded.

* Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

I. FACTS

David W. Freer, the decedent, was killed while working as a pile butt or pile driver on the expansion of the oil tanker docking facilities operated by Pacific Gas & Electric Company in Pittsburg, California. The dock extends into Suisun Bay, a body of navigable water, and D-H was expanding the facilities at the Pittsburg dock to accommodate a rising volume of fuel oil deliveries. Decedent was employed by D-H and was fatally injured when the top of a dolphin piling he was cutting fell on him. The dolphin was located in 35 feet of water, approximately 25 feet from the nearest dock.[1]

Decedent's wife was awarded death benefits by the ALJ who found that the decedent was killed over navigable waters, that he was engaged in maritime employment and was therefore an employee within section 2(3) of the Act. The ALJ also found that decedent was not a member of the crew of the crane barge on which he worked. The ALJ applied section 10(c) of the Act to determine decedent's average weekly wage in the amount of $368.64.

Both D-H and the claimant appealed the decision of the ALJ to the BRB. D-H challenged the findings that decedent was engaged in maritime employment and that he was not a member of the crew of a vessel. The claimant sought review of the average weekly wage computation arguing that the ALJ erred in applying section 10(c) rather than section 10(a) of the Act in determining the amount. Claimant also urged that the ALJ erred in failing to include certain fringe benefits in the computation of decedent's earnings. The BRB affirmed the decision of the ALJ. The parties press the same arguments in their appeal to this court.

II. STANDARD OF REVIEW

The Findings of Fact of the ALJ are reviewed by the BRB under the "substantial evidence" standard. 33 U.S.C. § 921(b)(3). The courts have held that the BRB must accept the ALJ's determinations unless they are contrary to the law.

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[1] A dolphin is a free standing pier consisting of metal, concrete or wooden pilings which support a concrete deck. Dolphins are used as temporary docks and as abutments.

irrational, or unsupported by substantial evidence. *E.g., Director (OWCP)* v. *Campbell Industries*, 678 F.2d 836, 838 (9th Cir. 1982). We must review BRB decisions for " 'errors of law and for adherence to the statutory standard governing the Board's review of the administrative law judge's factual determinations.' " *Id., citing Bumble Bee Sea Foods* v. *Director (OWCP)*, 629 F.2d 1327, 1329 (9th Cir. 1980). In *Duncanson-Harrelson Co.* v. *Director (OWCP)*, 644 F.2d 827, 830 (9th Cir. 1981), this court indicated that the BRB's determinations should be given deference since an administrative agency's interpretation of the statute which it administers is deserving of considerable respect. 644 F.2d at 830. *See, e.g., E. I. duPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 56-57, 97 S.Ct. 2229, 2235, 53 L.Ed.2d 100 (1977), quoting, *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 209, 67 S.Ct. 1575, 1583, 91 L.Ed. 1995 (1947). The Supreme Court, however, has noted that because the BRB does not make policy, its interpretations of the LHWCA are not entitled to any special deference. *Potomac Electric Power Co.* v. *Director (OWCP)*, 449 U.S. 268, 278 n.18, 101 S.Ct. 509, 514 n.18, 66 L.Ed.2d 446 (1980).

III. COVERAGE OF DECEDENT UNDER THE ACT

A. Maritime Employment

Before the 1972 amendments to the Act, a single geographic test (the "situs" requirement) governed coverage. An employee was entitled to benefits if he was injured while working on or over navigable waters of the United States, even though his occupation was not "maritime." *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 72, 100 S.Ct. 328, 331, 62 L.Ed.2d 225 (1979). There was also a requirement that the worker's employer have at least one employee, not necessarily the injured one, engaged in maritime employment. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 264, 97 S.Ct. 2348, 2357, 53 L.Ed.2d 320 (1977). Because most of those who employ workers for jobs on or over navigable waters also employ someone in a traditional maritime capacity, this second requirement was nearly always met, leaving the situs test as the only operative limitation on coverage.

The 1972 amendments expanded the definition of "navigable waters" to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel . . . ." 33 U.S.C. § 903(a). *See Caputo*, 432 U.S. at 260-64, 97 S.Ct. at 2355-57. But an injury sustained in this expanded area is covered only if the employee was engaged in "maritime employment" which includes "any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker" but not "a master or member of any vessel or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 U.S.C. § 902(3).

In *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976), this court held that in order for an injured employee's work to be considered "maritime," it "must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.' " . . . . *Id.* at 961, *quoting Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 272, 93 S.Ct. 493, 506, 34 L.Ed.2d 454 (1952).[2] Although D-H argues that the decedent's employment as a pile driver on a marine construction

[2] We note that the Fifth Circuit in a recent *en banc* decision reexamined the *Weyerhaeuser* interpretation of "maritime employment" and, based on the legislative history of the 1972 amendments to the Act, rejected the view that Congress intended to withdraw coverage from workers who previously were entitled to benefits based on the "situs" test alone—*i.e.*, workers injured on navigable waters whose employment was not maritime in nature. *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034 (5th Cir. 1982). The result in this appeal would be the same regardless of whether the Ninth or the Fifth Circuit's interpretation is applied: we find decedent's employment to be "maritime" even under the narrower *Weyerhaeuser* standard. The debate over the scope of "maritime employment" will be resolved when the Supreme Court reviews the Second Circuit's decision in *Churchill* v. *Perini North River Associates*, 652 F.2d 255 (2d Cir. 1981), *cert. granted sub nom. Director (OWCP)* v. *Perini North River Associates*, ____U.S. ____, 102 S.Ct. 1425, 71 L.Ed.2d 647 (1982). In *Perini*, the Second Circuit denied compensation under the Act to workers injured over navigable waters who were engaged in the construction of a sewage treatment plant. The court held that the work on the sewage treatment facility did not constitute "maritime employment."

project fails to satisfy the *Weyerhaeuser* test for "maritime employment," we recently stated that the Act covers workers involved in construction related to maritime activities. *Schwabenland* v. *Sanger Boats*, 683 F.2d 309 at 311 (9th Cir. 1982). In *Duncanson-Harrelson Co.* v. *Director (OWCP)*, 644 F.2d 827, 830 (9th Cir. 1981), a case involving facts very similar to the present appeal, we upheld the finding of the BRB that two employees, injured while constructing an off-shore dock for the unloading of oil from tankers, were engaged in maritime employment. One of the claimants was constructing a dolphin when his injury occurred. Similarly, the decedent in the present case was killed when the top of a dolphin piling he was cutting fell on him.

B. Member of a Crew of a Vessel

D-H argues that decedent was a crew member as defined by section 2(3) of the Act, 33 U.S.C. § 902(3). Section 2(3) provides that "the term 'employee' means any person engaged in maritime employment . . ., but such term does not include a master or member of a crew of any vessel . . . ." To find that an employee is a member of a crew excluded from coverage, the court must conclude that the vessel is in navigation, that the worker had a permanent connection with the vessel and that the employee was aboard the vessel primarily to aid in navigation. *Griffith* v. *Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 36 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054, 96 S.Ct. 785, 46 L.Ed.2d 643 (1976); *accord*, *Burks* v. *American River Transportation Co.*, 679 F.2d 69, 75-76 (5th Cir. 1982). Whether the decedent was a master or crew member is primarily a question of fact. *Longmire* v. *Sea Drilling Corp.*, 610 F.2d 1342, 1345 (5th Cir. 1980); *Wilkes* v. *Mississippi River Sand & Gravel Co.*, 202 F.2d 383, 389 (6th Cir.), *cert. denied*, 346 U.S. 817, 74 S.Ct. 29, 98 L.Ed. 344 (1953). Thus, the finding of the ALJ that decedent was not a member of a crew must be affirmed if it is supported by substantial evidence. *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251, 257, 60 S.Ct. 544, 547, 84 L.Ed. 732 (1940); *Hardaway Contracting Co.* v. *O'Keeffe*, 414 F.2d 657, 660-61 (5th Cir. 1968). The Supreme Court in *Bassett* stated that the question turns upon the employee's actual duties and held that the claimant's employment did not

aid in navigation except for the incidental task of throwing the ship's rope or securing the line—duties which could be performed by any harbor worker. 309 U.S. at 260, 60 S.Ct. at 549. The ALJ in this case made similar findings regarding decedent Freer's duties. The ALJ stated:

> [Decedent] did not have a permanent connection with the barge. He neither ate nor slept on the barge. In addition, he was not aboard the barge primarily to aid in navigation. *See Ryan* [v. *McKie Co.*, 1 BRBS 221 (1975)]. Anything he did in this regard was incidental to his primary work as a pile butt. As the Court noted in *South Chicago Coal & Dry Dock Co.* v. *Bassett*, 309 U.S. 251, 60 S.Ct. 544, 549 [84 L.Ed. 732] "The were persons serving on vessels, to be sure, but their service was not of laborers . . . and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation.' Moreover, it is not without significance that at the time of his death Mr. Freer was not even aboard the barge but instead was standing on the dolphin.

C.T., Vol. I at 198. The determination of the ALJ that decedent was not a member of a crew was upheld by the BRB. We affirm on the basis that findings of the ALJ are supported by substantial evidence.

IV. APPLICATION OF SECTION 910(c)

Claimant challenges the use of subsection (c) of section 910 of the Act and urges that subsections (a) or (b) should be applied to compute the decedent's average annual earnings.[3]

[3] 33 U.S.C. § 910(a), (b), (c) provide in pertinent part:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily

(footnote continued on following page)

The parties disagree on whether the issue is one of law or fact. We consider the nature of the decedent's work and the details of his employment to be factual findings. Whether particular facts fit within the meaning of certain legal terms is a question of law. *Cf. Estate of Franklin* v. *Commissioner*, 544 F.2d 1045, 1047 n.3 (9th Cir. 1976) (characteristics of transaction are questions of fact, but whether such characteristics constitute a "sale for tax purposes" is a question of law); K. Davis, *Administrative Law Treatise* § 30.01 (3d ed. 1972) (circumstances of arrest are questions of fact, but whether such circumstances amount to "probable cause" is a question of law). *But cf. Parkside, Inc.* v. *Commissioner*, 571 F.2d 1092, 1094-95 & n.5 (9th Cir. 1977) (two judges concurred in result, no majority rationale) (whether realty was held "primatily for sale in the ordinary course . . . of trade or business' is a question of fact arguably mixed with law, subject to the "clearly erroneous" standard of review).

To determine whether the ALJ applied the correct subsection of section 910 in computing decedent's average annual earnings, we must examine whether the employment in which decedent was engaged at the time of his injury was permanent and continuous, or seasonable and intermittent. *O'Hearne* v. *Maryland Casualty Co.*, 177 F.2d 979, 980-81 (4th Cir. 1949). Courts must consider the type of job the worker held when he was injured, not his personal employment history. *Id.* Permanent and continuous jobs fall under subsections (a) or (b),

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(footnote continued from previous page)

wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employeent in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee can not reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

whereas seasonal and intermittent jobs fall under (c). *Palacios* v. *Campbell Industries*, 633 F.2d 840, 842 (9th Cir. 1980); *Strand* v. *Hansen Seaway Service, Ltd.* 614 F.2d 572, 575 (7th Cir. 1980); *Tri-State Terminals, Inc.* v. *Jessee*, 596 F.2d 752, 754-55, 756 & n.3 (7th Cir. 1979); *O'Hearne* v. *Maryland Casualty Co.*, 177 F.2d at 980-81; *Marshall* v. *Andrew F. Mahony Co.*, 56 F.2d 74, 76-78 (9th Cir. 1932). Thus, for the ALJ to conclude, based on the decedent's employment history, that claimant's benefits should not be computed under either subsections (a) or (b) was error. We find, however, for the reasons set forth below that this was not a reversible error.

Assuming that decedent's job should have been classified permanent and continuous, whether the decedent was employed for "substantially the whole of the year" immediately preceding his injury determines which of subsections (a) or (b) should be applied. *Palacios* v. *Campbell Industries*, 633 F.2d at 842; *O'Hearne* v. *Maryland Casualty Co.*, 177 F.2d at 981-82; *see California Ship Service Co.* v. *Pillsbury*, 175 F.2d 873, 876 (9th Cir. 1949). *Compare* 33 U.S.C. § 910(a) ("if the injured employee shall have worked . . . during substantially the whole of the year") *with* 33 U.S.C. § 910(b) ("if the injured employee shall not have worked . . . during substantially the whole of the year"). Subsection (a) computes an average daily wage based on the claimant's actual employment history, whereas subsection (b) computes this figure using the hypothetical history of a typical worker engaged in similar employment in the same general locality. Subsection (b) applies to claims in which the injured worker has had too little time on the job to permit an accurate and fair computation of average daily wage: for example, the subsection would apply if a worker had been recently hired after having been unemployed, or out of the work force, or in a lower paying position. *See O'Hearne* v. *Maryland Casualty*, 177 F.2d at 982; *California Ship Service Co.* v. *Pillsbury*, 175 F.2d at 876. In this case, the decedent has been on the job for several years, and the evidence in the record is sufficient to enable computation of his average daily wage based on his own employment record. Thus, the ALJ should have found that decedent worked "substantially the whole of the year," and claimant's benefits initially should have been determined under subsection (a).

We find, however, that the ALJ's decision to compute claimant Freer's benefits under subsection (c) rather than subsection (a) should be affirmed because the decedent's actual employment history indicates that application of subsection (a) would provide excessive compensation. Because subsections (a) or (b) are premised on the injured employee having worked the entire year without injury, computation of benefits under either of these subsections for a worker in seasonal employment would result in overcompensation. *National Steel & Shipbuilding Co.* v. *Bonner*, 600 F.2d 1288, 1291 (9th Cir. 1979); *Tri-State Terminals, Inc.* v. *Jesse*, 596 F.2d at 757-58; *O'Hearne* v. *Maryland Casualty Co.*, 177 F.2d at 981; *Marshall* v. *Andrew F. Mahony Co.*, 56 F.2d at 76-78. Similarly, the courts have held that even if the worker's employment is permanent and continuous, computation of the average annual wage must be determined pursuant to subsection (c) if (a) or (b) cannot "reasonably or fairly be implied." 33 U.S.C. § 910(c). *Palacios* v. *Campbell Industries*, 688 F.2d at 842; *National Steel & Shipbuilding, supra*, at 1291; *Marshall, supra*, at 76-78; *see Todd Shipyards* v. *Director (OWCP)*, 545 F.2d 1176, 1179 (9th Cir. 1976). This can occur when there is insufficient evidence in the record to enable the ALJ to make an accurate computation under subsections (a) or (b). *National Steel & Shipbuilding, supra* at 1291; *Todd Shipyards, supra*, at 1179, or when such computation results in excessive compensation of the claimant in light of the injured worker's actual employment record. *Johnson* v. *Britton*, 290 F.2d 355, 357-59, (D.C. Cir.), *cert. denied*, 368 U.S. 859, 82 S.Ct. 99, 7 L.Ed.2d 56 (1961); *Marshall, supra*, at 78 (dicta); *see Tri-State Terminals, supra*, at 756. Although both possibilities are present here, we affirm the use of section 910(c) based on our finding that computation of Freer's benefits under subsections (a) or (b) would result in overcompensation and we do not reach the question of whether the evidence claimant introduced to show the earnings of a typical pile butt was insufficient.

Both subsections (a) and (b) compute the average annual wage of an employee working a five-day week by multiplying the worker's average daily wage by 260 (5 days a week × 52 weeks). Thus, if a claimant has worked less than 260 days in the year preceding his injury, he is overcompensated under

subsection (a) or (b). When Congress amended section 910 of the Act in 1948 to reflect the five-day work week, it undoubtedly was aware that virtually no one in the country works every working day of every week; there are many reasons including illness, vacations, strikes, unemployment, family emergencies, etc. We can infer that Congress knew that both subsections (a) and (b) would result in some overcompensation, but retained the 260-day factor for administrative convenience. *See generally O'Hearne* v. *Maryland Casualty Co.*, 177 F.2d at 982. But in *Marshall* v. *Andrew F. Mohony Co.*, 56 F.2d 74, 78 (9th Cir. 1932), the court explained:

> [I]t is not reasonable or fair to apply subdivisions (a) or (b) when to do so would result in ascertaining a mere theoretical earning capacity, having no regard to the actual facts of the case, but which would award arbitrarily to an injured laborer disability compensation in excess of what he was able to earn if at work, as shown by earnings.

Johnson v. *Britton*, 290 F.2d at 359.

Subsection (c) provides greater flexibility in determining an injured employee's average annual earnings. Consideration must be given to the previous earnings of the injured worker at the job where the injury occurred, the previous earnings of other workers in the locality employed in similar jobs, and other employment of the injured worker. 33 U.S.C. § 910(c); *Palacios* v. *Campbell Industries*, 633 F.2d at 842; *National Steel and Shipbuilding Co.* v. *Bonner*, 600 F.2d at 1292. The actual wages earned by the employee are not conclusive. *Palacios*, *supra*, at 843; *National Steel and Shipbuilding*, *supra*, at 1292. "It is manifest that the prime objective of § 10(c) was to insure that compensation awards would be based on accurate assessments of the claimant's earning capacity." *Palacios*, *supra*, at 843, *citing Tri-State Terminals, Inc.* v. *Jesse*, 596 F.2d at 756.

We do not believe that Congress contemplated overcompensation as large as that which would result in this case if Freer's benefits were to be calculated under subsections (a) or (b). This is a question of line-drawing—when does the disparity between the claimant's actual days worked and the 260-day factor become so large that computation of the average

annual wage under subsection (a) or (b) becomes unreasonable or unfair? If Freer's benefits are calculated under subsection (a), claimant receives benefits for sixty-five (or 33⅓ percent) more days than decedent actually worked. Because we find this disparity is large enough to justify application of subsection (c) in order to avoid excessive overcompensation of Freer, we uphold the ALJ's use of subsection (c).

V. EMPLOYER CONTRIBUTIONS TO PENSION AND HEALTH FUNDS.

The Act defines wages to include:

> [T]he money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, *including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer*, and gratuities received in the course of employment from others than the employer.

33 U.S.C. § 902(13) (emphasis added). Claimant Freer urges that contributions to the union pension and health funds made by D-H on behalf of the decedent are within the meaning of section 902(13) and should have been included in the ALJ's calculation of the decedent's average annual wage.[4]

The ALJ determined that these employer contributions are not wages under the Act. Under the collective bargaining agreement, D-H paid its contributions directly to the trust fund, not the individual employees, thus the ALJ reasoned that "[t]his payment, which by its nature is not capable of being converted to the immediate advantage of the employee, is not a 'similar advantage' to 'board, rent, housing, lodging' within the meaning of section 2(13)." C.T., Vol. I at 202. The BRB affirmed, stating that these benefits are too speculative to be included in an employee's wages because "the employee has no entitlement to these benefits." *Id.* at 6-7. The BRB cited its previous decisions in *Collins* v. *Todd Shipyards Corp.*, 5 BRBS

[4] D—H agreed to pay pension fund benefits in the following amounts for each hour that each covered employee worked or was paid for, whichever is greater: 80 cents for work performed until September 1, 1974; 85 cents for work from that date until April 1, 1975; $1.15 for work from that date until July 1, 1975; $1.23 for work performed thereafter.

334, BRB No. 76-177 (Jan. 5, 1977) and *Hilyer* v. *Morrison-Knudsen Co.*, 6 BRBS 754, BRB No. 76-410 (Sept. 30, 1977), *rev'd*, 670 F.2d 208 (D.C. Cir. 1981), *petition for cert. filed sub nom. Morrison-Knudsen Construction Co.* v. *Director, (OWCP)*, No. 18-1891 (April 13, 1982). In *Hilyer*, the Director of the Office of Workers' Compensation Programs (Director) successfully argued before the court of appeals that employer contributions to union pension plans should be included in computing an injured employee's average wage. 670 F.2d at 211-13. Since that time, the Director has abandoned the position argued in *Hilyer* and now urges this court to hold that such payments are not wages. We do not find any of the Director's arguments for rejecting *Hilyer* persuasive.

The Director correctly argues that the court must consider the language of the statute, guided by the plain and ordinary meaning of the words Congress used. *Richards* v. *United States*, 369 U.S. 1, 9, 82 S.CT. 585, 590, 7 L.Ed.2d 492 (1961). But the Director insists we must apply a narrow definition of wages which excludes fringe benefits because when Congress enacted the statute in 1927 it would not have considered such benefits to be part of an employee's wages.[5] The Director further argues that only by congressional amendment could the Act's description of "wages" be expanded to include fringe benefits.[6] Although the concept of wages may have changed

[5] The Director relies on the definition of "wages" provided in *Webster's New International Dictionary* 2863 (2d ed. 1957): "pay given for labor, usually manual or mechanical, at short intervals, as distinguished from salaries or fees." *Webster's* second edition, published originally in 1934, remained unchanged until the third edition, published in 1961. *See Webster's Third New International Dictionary* 6a, 7a (1961). In contrast the third edition states that "wages" often include "amounts paid by the employer for insurance, pension, hospitalization, and other benefits." *Id.* at 2569.

[6] The Director points to the legislative history of the 1964 amendment to section 1 of the Davis-Bacon Act, 40 U.S.C. § 276a(b), as indication that only by congressional amendment could the Act's definition of "wages" be expanded to include fringe benefits. While it is true that Congress' 1964 amendment defined wages to include employer contributions to trust funds, the Davis—Bacon Act is distinguishable because prior to the 1964 amendment, the statute did not provide any specific articulation of "wages." *See* Act of March 3, 1931, c. 411, § 1, 46 Stat. 1494; Act of Aug. 30, 1935, c. 825, 49 Stat. 1011; Act of June 15, 1940, c. 373, § 1, 54 Stat. 399; Act of July 12, 1960, P.L. 86-624, § 26, 74 Stat. 418. Because Congress envisioned the inclusion of certain fringe benefits in its definition of "wages" under the LHWCA, we disagree with the Director's argument that new legislation is required to reflect modern concepts of wages.

since 1927, we do not find that Congress intended an inflexible meaning of "wages" in the definition provided by section 902(13).[7] Examining the plain meaning of the language Congress used, we note that several fringe benefits were listed including "the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer . . . ." *Id.* This language indicates a flexible definition encompassing other fringe benefits not specifically mentioned by Congress that provide the employee with a "similar advantage." Moreover, the standard of liberal construction of the Act in favor of claimants suggests that Freer's broader interpretation of "wages" should be adopted to include employer contributions to health and pension plans. *See Voris* v. *Eikel*, 346 U.S. 328, 74 S.Ct. 88, 98 L.Ed. 5 (1953); *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408, 414, 52 S.Ct. 187, 189, 76 L.Ed 366 (1932).

We agree with the court's reasoning in *Hilyer* v. *Morrison-Knudsen Construction Co.*, 670 F.2d at 211-13, that the Act's definition of "wages" includes the values received from the employer that are easily identifiable and calculable. Although not expressly mentioned in section 902(13), the BRB has

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[7] The Director contends that the Supreme Court's decision in *Potomac Electric Power Co.* v. *Director (OWCP)*, 449 U.S. 268, 101 S.Ct. 509, 66 L.Ed.2d 446 (1980) (*PEPCO*), supports the view that we must interpret the term "wages" according to the definition that was commonly accepted in 1927. We disagree.

In *PEPCO*, the court of appeals had held that computation of the employee's award under the Act's schedule benefit provisions was inappropriate because these provisions provided inadequate compensation for claimant's permanent partial disability. But the Supreme Court rejected computation under an alternative provision and reaffirmed the applicability of the Act's schedule benefit provisions as enacted in 1927 to determine the claimant's benefits. Although acknowlendging the "recent trend" in workmen's compensation decisions away from the position that scheduled benefits are exclusive, the Supreme Court found such flexibility unsupported by the statute and inconsistent with Congress' intent. *Id.* at 276-80, 101 S.Ct. at 514-516.

In the present appeal, we are not determining whether the provisions of section 902(13) should be ignored in light of more modern concepts of "wages" or decisions affording greater latitude. We are interpreting a definition of "wages" which by its terms provides some flexibility. Congress specifically listed several fringe benefits in its definition of wages and stated that other benefits providing "similar advantage" should also be considered. *See* 33 U.S.C. § 902(13).

included such values as vacation pay and overtime compensation within the Act's concept of "wages." *Id.* at 211. In *Hilyer*, employer contributions to benefit funds were found to be identifiable, calculable values and therefore included within "wages" under the LHWCA. *Id.*

The court in *Hilyer* attached little significance to the fact that the employer's contributions were made directly to the union benefit funds, not the employees, or that the employee exercised no control over the day-do-day management of the funds. The court found that these payments provided substantial economic value because if the employer did not provide health and pension benefits, the employees would have to spend their own money to acquire them. *Id.* at 211; *see W.W. Cross* v. *NLRB*, 174 F.2d 875, 878 (1st Cir. 1949). We agree that these contributions represent "an important part of the employees' total compensation, and an equally important part of the employer's labor costs." *Hilyer, supra*, at 212 n.7.

The Director argues that the Court's treatment of employer contributions in *United States* v. *Carter*, 353 U.S. 210, 77 S.Ct. 793, 1 L.Ed.2d 776 (1957), should not be interpreted to support claimant's position that the payments are wages under the Act. In *Carter*, the Court held employer contributions to a union benefit fund were part of the "sums justly due" to employees under the Miller Act, 40 U.S.C. §§ 270a *et seq.*[8] The surety in *Carter* argued that employer contributions made directly to trust funds were not "wages" owing to the employees and that its obligation had been satisfied by payment of all "wages" owed to them. *Id.* at 217, 77 S.Ct at 797. The Court, however, construed the contributions to the health and pension funds to be part of the consideration that the employer agreed

[8] Section 1(a)(2) of the Miller Act requires that before contracts above $2,000 are awarded for construction involving public buildings, the contractor must post a payment bond with a satisfactory surety "for the protection of all persons supplying labor and material." 40 U.S.C. § 270a(a)(2).

Section 2(a) provides that "[e]very person who has furnished labor or material in the prosecution of the work provided for in the contract . . . and who has not been paid in full therefor . . . shall have the right to sue on such payment bond . . . for the *sum or sums justly due* him . . . ." 40 U.S.C. § 270b(a) (emphasis added).

to pay its workers, *id.* at 217-18, 77 S.Ct. at 797, despite the terms of the trust agreement which expressly stated that such payments were not to be considered "wages" due the employees. *Id.* at 214, 77 S.Ct. at 795. Thus, contract provisions which purported to define pension fund contributions as something other than employee compensation did not stop the Court from finding the payments to be "sums justly due" the employees.

Applying a common sense approach, the Court in *Carter* reasoned that if the collective bargaining agreement had specified that the employer would pay each employee a certain amount above the prevailing wage, and if the employee had in turn contracted with his union to forward this amount to the pension fund, the contribution would be seen as part of the employee's compensation. *See id.* at 217, 77 S.Ct. at 797; *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d at 212. Similarly, we conclude that the employer's payments in the present case should not be excluded from the computation of an employee's average weekly wage simply because D-H has eliminated two unnecessary steps by agreeing to pay the contributions directly to the union benefit funds. *Id.*

The Director relies on *United States v. Embassy Restaurant*, 359 U.S. 29, 79 S.Ct. 554, 3 L.Ed.2d 601 (1959), in which the Court determined that benefit fund contributions were not entitled to the priority given to "wages . . . due to workmen" under the Bankruptcy Act. Although acknowledging that unions bargain for these contributions as part of the employee's total wage package and that decisions under the National Labor Relations Act and the Social Security Act had treated various fringe benefits as "wages," the Court emphasized that its construction of "wages . . . due to workmen" must be governed by the context of the Bankruptcy Act and by Congress' purpose in providing the priority. *Id.* at 33, 79 S.Ct. at 556. The Court expressed concern that the protection afforded employees by the priority given to their wages might be weakened if the workers had to share their recovery with the benefits plan. *Id.* at 33-34, 79 S.Ct. at 556. Thus, the Court construed "wages . . . due to workmen" narrowly and found that Congress did not intend to include other forms of compensation. *Id.* at 35, 79 S.Ct. at 557. Here, by contrast, the

LHWCA expressly includes several forms of compensation within its definition of "wages." *Hilyer* v. *Morrison-Knudsen Construction Co.*, 670 F.2d at 213. Moreover, in accordance with the Act's remedial purpose, we find that Congress intended to include all identifiable values provided to employees in the formula for computing "wages" received in return for their labor at the time of injury. *Id.*

In sum, we find that the contributions of D-H to the union benefit plans must be included in the computation of the decedent's average weekly wage. Accordingly, the portion of the BRB's decision concerning employer contributions is reversed and we remand to the BRB for the computation of claimant's benefits in a manner consistent with this holding.

The ruling of the Benefits Review Board is AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX C

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
Washington, D.C. 20210

NANCY A. FREER
(Widow of DAVID W. FREER)
Claimant-Respondent
Cross-Petitioner

v.

DUNCANSON-HARRELSON COMPANY
and
EMPLOYERS MUTUAL LIABILITY
INSURANCE COMPANY
Employer/Carrier-
Petitioners
Cross-Respondents

Filed as Part of the Record Jan. 31, 1979

(Clerk) Benefits Review Board

BRB Nos. 76-314 & 76-314A

DECISION

Appeals from the Decision and Order of Fauster Vittone, Administrative Law Judge, United States Department of Labor.

B. James Finnegan (Kiernan & Finnegan), San Francisco, California, for the employer/carrier.

W. Martin Tellegen (Hall, Henry, Oliver & McReavy), San Francisco, California, for the claimant.

Before: SMITH, Chairman, MILLER and KALARIS, Members.

KALARIS, Member:

These are appeals by the employer/carrier (hereinafter, the employer) and the claimant from a Decision and Order (76-LHCA-266) of Administrative Law Judge Fauster Vittone pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter, the Act).

The facts in this case are not in dispute. On May 27, 1975, the then twenty-six year old decedent was killed when the top of a dolphin piling he was cutting fell on him. The dolphin, a free standing pier, was being constructed in 35 feet of water in the Suisun Bay near Pittsburg, California, approximately 25 feet from the nearest land-based dock. The dock was being constructed by Duncanson-Harrelson Company for Pacific Gas and Electric Company (P.G. & E.) in order to accommodate a rising volume of fuel oil deliveries to P.G. & E. The decedent's duties as a pile driver included removing old piling, acting as a rigger for a crane on a barge, lining up piling preparatory to this being driven into the floor of the bay, and cutting off the tops of piles after they had been driven to the appropriate depth. At the time of his death, Mr. Freer was married and had three dependent children.

The administrative law judge ruled that the decedent was an employee within the meaning of Section 2(3), 33 U.S.C. §902(3); that the injury occurred upon "navigable waters," within the meaning of Section 3(a), 33 U.S.C. §903(a); that the decedent was not a member of a crew; that the employer is an "employer" within the meaning of Section 2(4), 33 U.S.C. §902(4); that the decedent's average weekly wage, computed according to Section 10(c), 33 U.S.C. §910(c), was $368.64; and that the claimant's counsel is entitled to attorney's fee in the amount of $8,627, and costs of $136.40. Both the employer and the claimant appeal.

The employer contends that the decedent is not an employee within the meaning of Section 2(3); that the decedent was a "member of a crew"; and that death benefits under Section 9, 33 U.S.C. §909, should be subject to the same limitations for maximum weekly compensation as provided by Section 6(b)(1), 33 U.S.C. §906(b)(1).

We do not agree with employer's contention that claimant is not an employee engaged in maritime employment within the meaning of Section 2(3) of the Act; nor do we agree with employer's alternate contention that claimant is a "member of a crew," and hence excluded from coverage under Section

3(a)(1) of the Act.[1] This Board has previously held that employees directly engaged in the construction of docks, piers, wharves, etc. used in the loading, unloading, repair or construction of ships are "harbor workers" within the meaning of Section 2(3). *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, BRB No. 76-451 (Jan. 12, 1978); *Silva v. Massman Construction Co.*, BRBS . BRB No. 78-341 (Jan. 31, 1979); *Martin v. Kaiser Steel Corp.*, BRBS . BRB No. 78-449 (Jan. 31, 1979); *Crawford v. Trotti & Thomson, Inc.*, BRBS . BRB No. 78-490 (Jan. 31, 1979); *Hed v. Duncanson-Harrelson Co.*, 7 BRBS 821, BRB No. 77-260 (Feb. 24, 1978); *Hunter v. Duncanson-Harrelson Co.*, 8 BRBS 83, BRB No. 77-433 (March 30, 1978); *Bakke v. Duncanson-Harrelson Co.*, 8 BRBS 36, BRB No. 77-259 (Feb. 24, 1978). Indeed, the facts regarding claimant's employment are similar to those in *Hed* wherein the same contentions were rejected. While the Board no longer adheres to the additional basis for finding status which was set forth in *Hed*, namely that claimant is also covered because he was injured over navigable waters as that term was defined pre-amendment, that case is otherwise controlling.

The employer also argues that death benefits under Section 9 of the Act should be subject to the same limitations for maximum weekly compensation as provided by Section 6(b)(1). The Board has held that death benefits, unlike compensation payments, are not subject to a maximum ceiling. The Board's view was recently affirmed by the U.S. Court of Appeals for the Ninth Circuit, the Circuit wherein this case arises. *Director, Office of Workers' Compensation Programs v. Rasmussen*, 567 F.2d 1385, 7 BRBS 403 (9th Cir. 1978), *aff'g Rasmussen v. GEO Control, Inc.*, 1 BRBS 378, BRB Nos. 74-204, 74-204A (April 3, 1975). In this connection, we note that two other circuits have rejected this holding, *see Director, Office of Workers' Compensation Programs v. O'Keeffe*, 545 F.2d 337, 4 BRBS 563 (3d Cir. 1976), *rev'g O'Keeffe v. Morris Boney, Inc.*, 2 BRBS 363, BRB No. 75-179 (Oct. 16, 1975) and

[1] Section 2(3) of the Act also excludes a member of a crew from the term "employee".

Director, Office of Workers' Compensation Programs v. Boughman, 545 F.2d 210, 5 BRBS 30 (D.C. Cir. 1976), *rev'g Ekar v. Int'l Union of Operating Engineers*, 1 BRBS 406, BRB No. 74-209 (April 11, 1975), and that the *Rasmussen* case is currently before the Supreme Court. Pending a ruling by that tribunal, we continue to apply the rule that death benefits are not subject to maximum ceiling. *Richman v. Hudson River Dayline, Inc.*, 8 BRBS 273, BRB No. 77-467 (April 27, 1978). Therefore, the administrative law judge's finding on this issue is affirmed.

The administrative law judge awarded benefits based on an average weekly wage of $368.64, pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c). The administrative law judge did not apply Section 10(a) of the Act, 33 U.S.C. §910(a), inasmuch as he concluded that decedent had not worked substantially the whole of the year prior to his injury and that decedent's employment was discontinuous. Claimant appeals this determination contending that the administrative law judge erred in not applying Section 10(a) of the Act, 33 U.S.C. §910(a), in failing to include pension plan contributions in claimant's average weekly wage, in failing to include strike time in claimant's average number of days worked per year, and in failing to place heavier reliance in computation on the time period between June 1973 and May 1974 as more representative of claimant's earnings.

In the year prior to his injury, decedent lost time when he was on strike, when he left work to go on vacation, and when he was unable to find work after returning from vacation. *Decedent's employment was, therefore, discontinuous.* Moreover, there is no indication that the nature of claimant's work provided year round employment. In light of this combination of circumstances, we agree with the administrative law judge that Section 10(a) of the Act was inapplicable.

Moreover, we conclude that the administrative law judge's calculations pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), yielded a reasonable approximation of claimant's earning capacity at the time of injury and therefore must be affirmed. *Orkney v. General Dynamics Corp.*, 8 BRBS 543, BRB No. 77-877 (June 30, 1978). The administrative law judge did not include in this calculation time lost due to the strike.

However, he did include in his calculation five percent more man hours than actually worked in the year preceding the injury taking into consideration the number of hours worked between June 1973 and May 1974. In view of the factual pattern presented in this case, we are not prepared to label the average weekly wage arrived at by the administrative law judge as unreasonable.

We also reject claimant's contentions that employer's contributions to the union pension fund whould be included in the calculation of claimant's average weekly wage. In *Collins v. Todd Shipyards Corp.*, 5 BRBS 334, BRB No. 76-177 (Jan. 5, 1977), the Board concluded that such contributions were not includible. *See also Hilyer v. Morrison-Knudsen Co.*, 6 BRBS 754, BRB No. 76-410 (Sept. 30, 1977). Unlike payments for overtime and for vacations, which are payments that the employee has already earned and is entitled to enjoy, the benefits from payments to health and pension funds are directly contingent upon the occurrence of a future event that may or may not happen. Until the occurrence of this event, the employee has no entitlement to these benefits. Furthermore, should the event that triggers the entitlement to health or pension benefits never occur, it depends upon the particular benefit plan and the terms of the applicable labor contract whether the employee receives any amounts from the plan. Thus such "fringe benefits" as health and pension plans are too speculative to be included in a computation of one's average wage.

Moreover, the inclusion of benefits, such as health and pension, in the computation of average weekly wage may result in the payment of excessive benefits to the employee. With many benefit programs, an employer only contributes and an employee is only qualified to participate in the program so long as the employee is employed with the employer. *Thus, assuming that nothing else occurs, the employee's entitlement to the amounts in the benefit program would only have continued until his or her retirement or death. If one includes, within a determination of one's average weekly wage, the value of these "fringe benefits" after the point in time when the employee either would have retired or died, the employee or his survivors would be*

receiving a compensation award that included amounts to which the employee would not have been entitled had the injury not occurred.

For example, compensation for permanent total disability continues until death and even beyond through the payment of death benefits. The fact that a claimant may have eventually retired is irrelevant to the continuation of compensation payments. However, if contribution to a pension fund were includible in the average weekly wage, claimant after reaching what would have been his retirement age where wages normally stop and pension begins would in effect receive compensation in lieu of his wages plus any pension benefits. While this is a permissible result where an injured claimant retires because of his injuries and receives both compensation and a pension he has fully earned, [*Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, BRB No. 76-317 (Aug. 23, 1977)], this result should not be mandated through an inclusion of pension contributions in the calculation of average weekly wage.

The claimant also appeals the award of the $8,627.00 attorney's fee. The award reflected a fee for all hours worked by both the attorney and his law clerks at their normal hourly rate. However, claimant contends that this fee is inadequate since the case is one of first impression under the 1972 Act having broad ranging implications to the employer and the marine construction industry in general, and since the increase in benefits to the claimant was approximately $450,000.

If a claimant's attorney or an employer objects to the size of a fee award, he must show that it is not in accordance with law, or was arbitrary, capricious or an abuse of discretion. *Offshore Food Service, Inc. v. Murillo*, 1 BRBS 9, BRB No. 141-73 (May 15, 1974), *aff'd sub nom., Offshore Food Service, Inc. v. Benefits Review Board*, 524 F.2d 967 (5th Cir. 1975). In setting the amount of the fee, the administrative law judge should take into consideration the number of hours worked, the result obtained, the complexity of the case, the quality of the services, by whom the services were performed, and the prevailing rate for attorneys in the area. *See* 20 C.F.R. §702.132; *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973); *Palacios v.*

Campbell Industries, 3 BRBS 37, BRB No. 75-190 (Dec. 3, 1973). In the instant case, the Board is of the opinion that the administrative law judge failed to give sufficient consideration to the complexity of this case and the amount of benefits gained. Normally, the Board would remand this case to the Office of Administrative Law Judges for reconsideration by the administrative law judge of the attorney's fee awarded, but the administrative law judge assigned to this case has died since the decision was rendered. In the interest of administrative economy, the Board modifies the attorney's fee award to $10,500.

Claimant's counsel requests a $3,000 fee for services rendered defending against employer's appeal, and $2,000 for services rendered prosecuting claimant's appeal. Of the $3,000 requested for defense of the appeal, actual billing hours account for $1,827.00. However, claimant's counsel contends that the complexity of the case, the quality of the representation and the amount of benefits obtained should also be considered. Similarly, hourly billing accounts for only $1,871.50 of the $2,000 fee requested for time prosecuting claimant's appeal.

Claimant's attorney is granted a fee in the amount of $1,827.00 for services rendered in successful defense of the appeal. Inasmuch as claimant's appeal was unsuccessful, no fee for those services is warranted. 33 U.S.C. §928; 20 C.F.R. §802.203. While we acknowledge that the instant case presented at the time many issues that were not clear cut and involved a large amount of benefits, it is obvious that the bulk of the work dealing with and clarifying these complex issues was done at the administrative law judge level. The fee award at that level now reflects the complexity of the case and the amount of benefits obtained. We believe that a fee award at the appellate level based solely on claimant's attorney's hourly billing rate adequately compensates claimant's attorney considering the posture of this case.

Accordingly, the Decision and Order of the administrative law judge as modified is affirmed.

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ISMENE M. KALARIS, *Member*

SMITH, Chairman, concurring:

I concur in the result reached by the majority on all issues, however, with respect to the jurisdiction issue my colleagues do not carry their analysis far enough in finding the work activities of the deceased David W. Freer covered under the Act.

In finding that the deceased satisfied the "status" test of Section 2(3) of the Act, the majority finds the relevant facts in the instant case to be quite similar to those in *Hed v. Duncanson-Harrelson Co.*, 7 BRBS 821, BRB No. 77-260 (Feb. 24, 1978) and concludes that case is controlling and dispositive of the jurisdictional issue in this case. However, in *Hed, supra*, in finding that claimant met the "status" test of Section 2(3) of the Act, the Board in effect applied a "moment of injury test" which I now believe to be in error. Furthermore, it appears to me that the majority's approach in this case is not consistent with previous Board decisions. *See McNeil v. Prolerized New England Co.*, 8 BRBS 1, BRB No. 77-328, 77-328A (March 20, 1978); *Mildenberger v. Cargill, Inc.*, 2 BRBS 5, BRB No. 74-224 (July 3, 1975); *Coppolino v. International Terminal Operating Co.*, 1 BRBS 205, BRB No. 74-136 (Dec. 2, 1974). In *McNeil, supra*, claimant was classified as a maintenance man in a scrap yard adjacent to the Mystic River and his duties involved the maintenance and repair of all employer's equipment. Claimant's duties also required that he go aboard ships docked at employer's pier to repair equipment used in loading the processed scrap metal, to assist in the loading operation itself, and to man lines on the dock. Claimant was injured on August 21, 1975 at a time when he was repairing equipment not involved in the ship loading process. The administrative law judge found that the claimant in *McNeil, supra* was not covered under the Act because he did not meet the Section 2(3) "status" test because claimant "was not engaged in maritime employment at the time of the injury." The Board, citing *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 97 S. Ct. 2348, 53 L. Ed. 2d 320 (1977), reversed the administrative law judge and stated, "The Board has consistently rejected the 'moment of injury' test." However, in *Hed, supra*, and in this case after determining that construction of the offshore dock upon which deceased was working at the time of his injury

constituted maritime employment, the analysis stopped and we made no attempt to look at the entire scope of the work activities of the deceased with this employer, or any other employer. A claimant who at the moment of injury was not involved in maritime employment is entitled to have the trier of the fact consider his entire work activity in determining coverage. By the same token a claimant who was performing a maritime function at the moment of his injury, must likewise submit his entire work activity to the same scrutiny. In my view the status test (Section 2(3) of the Act) does not allow a focus on an employee's particular activity at the time of injury but requires scrutiny of the employee's entire work activity and duties related thereto. This of course can be accomplished only on a case by case basis. We should apply the same standard to all status test cases arising under Section 2(3) of the Act.

The record in this case reflects that the deceased David W. Freer was employed by the employer Duncanson-Harrelson Company, except for periods when he was laid-off, from the Spring of 1973 until the date of his death on May 27, 1975. During this period of time deceased worked: (1) in the construction of a pier for Urich Oil at Martinez, California; (2) work involving the locks in Del-Marin Keys near Novato, California; (3) work on Pier 96 in San Francisco and (4) a job somewhere in south San Francisco. Claimant had been working for employer at the Pacific Gas & Electric fuel dock since February 16, 1975. It appears clear to me that, although the evidence is a bit sketchy, with the exception of the "south San Francisco" job which was not elaborated on at all, all the other jobs upon which the deceased worked for the employer were maritime in nature. Since clearly a majority of claimant's work activities and time involved maritime related work I would find that he has satisfied the "status" test pursuant to Section 2(3) of the Act and is thus entitled to benefits.

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SAMUEL J. SMITH, *Chairman*

MILLER, Member, Concurring in Part and Dissenting in Part:

For the reasons fully set forth in my dissenting opinion in *Sedmak v. Perini North River Associates*, BRBS , BRB Nos. 77-896 *et al.* (Jan. 12, 1979), I concur in the affirmance of the administrative law judge's conclusion that claimant was an employee under the Act. I also concur in the affirmance of the conclusion that death benefits are not subject to the maximum limitations provided by Section 6(b)(1).

I respectfully dissent from the rejection of claimant's contention that employer's contributions to the union pension fund should be included in the computation of claimant's average weekly wage. Section 2(13) of the Act, 33 U.S.C. §902(13), defines "wages" as:

> [T]he money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others then the employer.

The reasons for excluding so-called "fringe benefits" from the computation of average weekly wages, as set forth in the majority opinion and the cases cited therein, are as follows:

> 1. The receipt by the employee of benefits from payments to health and pension funds is directly contingent upon the occurrence of some future event that may or may not happen. Thus such fringe benefits are too speculative to be included in a computation of one's average weekly wage.
>
> 2. Unlike the value of payments for overtime and vacation pay, the value of fringe benefits is not includible in an employee's gross income for income tax purposes.
>
> 3. The inclusion of such benefits as contributions to health and pension funds in the computation of average weekly wage may result in a windfall for the employee.

While it is true that an employee is not entitled to receive payments from health or pension funds until the occurrence of a

given event, the employee typically does have a contractual right to have contributions made to those funds on his or her behalf by the employer. That expenditure by the employer relieves the employee of the burden of purchasing health and retirement coverage. In the case of *Harris v. Lambros*, 56 F.2d 488 (D.C. Cir. 1932), the court reasoned in including in the computation of average weekly wages the value of meals provided to employees as a matter of custom, but not under the contract of hiring, that:

> [H]ere we have a case in which employees, by reason of the nature of their employment are relieved of the burden of providing food for themselves, and the money value of that benefit is fixed by stipulation so that we are not left to speculation as to it. . . .[T]he whole purpose of the Act is to provide indemnity to an injured employee based upon the wage loss sustained by him as a result of the injury, and to an employee of this defendant the loss in such case would not be his wages alone, but his wages and his food, since each was a benefit which he enjoyed while employed and is deprived of when injured.

56 F.2d at 489. Similarly, the computation of the wage loss sustained by an employee who has had the benefit of health and pension coverage paid for by the employer should include the value of employer's contributions for that coverage. If those contributions are not included in the computation and the employee or his or her survivors must deplete the compensation received in order to obtain the benefits previously provided by the employer, the compensation clearly would not provide indemnity for the wage loss sustained as a result of the injury. Thus, refusal to include fringe benefits in the computation is contrary to the remedial purpose of the Act. The value of such benefits should be relatively easy to ascertain from employer's records or from the contract itself.

The includibility in the computation of an employee's wage of the value of fringe benefits provided by the employer should be determined without regard for the includibility of the value of those benefits in the computation of gross income for tax purposes. There is no indication in the Act, or the legislative

history of the Act, that Congress intended that items excluded from gross income for tax purposes should also be excluded from the computation of wages for compensation purposes. It is notable that the values of meals or lodging provided by the employer, which are specifically includible in the computation of wages under the Act, are excluded from computation of gross income for tax purposes under 26 U.S.C. §119. It is also significant that the purpose of the Internal Revenue Code is to raise revenues and that exclusions from gross income, which provide some tax relief to taxpayers, are narrowly construed against taxpayers. The Longshoremen's and Harbor Workers' Compensation Act, on the other hand, is a remedial statute and is to be construed liberally to effectuate the purpose of compensating employees for injuries arising out of an in the course of employment. *Voris v. Eikel*, 346 U.S. 328 (1953).

The majority notes that with many benefit programs an employer only contributes and an employee is only qualified to participate in the program as long as the employee is employed with the employer and that inclusion of the value of fringe benefits in the computation of average weekly wage after the time when the employee either would have retired or has died results in a windfall to the employee or his or her survivors. This is not an adequate reason for excluding the value of fringe benefits, as the same reasoning could be applied to vacation pay, overtime pay and even to the claimant's hourly wage, all of which are included in the computation of compensation payable after the claimant would have retired or has died.

Several other reasons for including fringe benefits in the computation of average weekly wages should be noted. First, when contracts involving wage increases are negotiated, it is common practice that once the amount of the hourly increase is agreed upon, it is left to representatives of the employees to determine what portions of the increase will be allocated to pay and to various fringe benefits. It is also significant that the guidelines proposed in the Wage and Price Standards published by the Council on Wage and Price Stability on December 13, 1978, which recommend limiting annual wage increases to seven percent, include the value of fringe benefits in that seven

percent. These facts suggest that fringe benefits are contemplated as constituting part of the remuneration paid by employer for services by employees.

Finally, I would note that when the Act was first enacted in 1927 few, if any, fringe benefits were provided by employers. It is my opinion that Congress intended the definition of "wages" to be flexible by including in that definition the term "similar advantage received from the employer." Since provision by employers of such fringe benefits as contributions to health, retirement, group legal insurance and other funds, education benefits and child care has become a common, bargained-for part of the employer's payment in exchange for work performed by employees, payments for those benefits should be construed as "similar advantage" in determining the amount of an employee's wage.

.....

JULIUS MILLER, *Member*

Dated this 31st day of January 1979.

APPENDIX D

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of
DAVID W. FREER [Deceased]
NANCY A. FREER
Claimant

against

DUNCANSON-HARRELSON
Employer

EMPLOYERS MUTUAL LIABILITY INSURANCE
Carrier

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

Case No. 76-LHCA-266
OWCP No. 13-34919

Filed as Part of the Record JUL. 14. 1976

(Clerk) Benefits Review Board

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For the Department of Labor

Before: FAUSTER VITTONE
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This is a claim for compensation made pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. Section 901 *et seq.*), hereinafter referred to as the "Act" and the rules and regulations issued by the Secretary of Labor under authority therein contained (20 C.F.R. 702.331).

David W. Freer, the deceased, was employed by Duncanson-Harrelson Company (hereinafter "D-H") as a pile butt on a contract being performed by D-H for Pacific Gas & Electric Company (hereinafter PG&E) on and about PG&E's fuel dock in Pittsburg, California. Mr. Freer was killed on May 25, 1975 when the top of a dolphin piling he was cutting fell on him. The dolphin was located in thirty-five feet of water, approximately twenty-five feet from the nearest dock. (A dolphin is a free standing pier consisting of metal, concrete, or wooden pilings which support a concrete deck. Dolphins are used as temporary docks and as abuttments.)

The dock extended into Suisun Bay, a body of navigable water. Fuel oil is transported to Pittsburg by ships which dock at the PG&E fuel dock and unload their cargo. D-H was expanding the docking facilities of the Pittsburg dock to accommodate a rising volume of fuel oil deliveries. In addition to driving pilings for a new barge dock, D-H had built other dolphins in the area. It was to remove the existing dolphins and construct new dolphins, dredge the dock site, modify and install rubber fenders on the corner dolphins, construct a barge dock, and do maintain repair of the existing dock and causeway.

On the PG&E dock job and on other jobs, D-H used several water crafts, e.g., crane barges, a material barge, boats with outboard motors, and a flexi-float. It also owns derrick barges, flat barges, and skiffs. On occasion, it leases other water craft such as additional barges, and tugs.

Approximately forty percent of all the work performed by D-H in 1973, 1974, and 1975 consisted of marine jobs similar to

the PG&E fuel dock job, and approximately sixty percent of its gross income during those years was derived from approximately ninety-seven marine jobs.

Mr. Freer worked as a pile butt at the Pittsburg dock from approximately February 16, 1975 until the date of his death. During this period his duties included removing old piling, acting as a rigger for the crane on the barge, lining up piling preparatory to its being driven into the marine floor, and cutting off the tops of piles after they had been driven to the appropriate depth.

Mr. Freer was 26 years old at the time of his death. He was married and had three dependent children. He was a member of the Piledrivers, Carpenters, Bridge, Wharf and Dock Builders, Local Union No. 34. The Respondents do not dispute that he was employed by D-H at the time of his death, and there is no dispute that his death arose out of and occurred in the course of his employment.

This case raises a number of issues which will be discussed and decided as follows:

1. Did the injury occur on "navigable waters" within the meaning of the Act?

   Section 3(a) of the Act provides, in part, that benefits are payable if the "death results from an injury occurring upon the navigable waters of the United States including any adjoining pier, wharf, dry dock, terminal, buildingway, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel . . . . "

   Respondents contend that the injury did not occur on "navigable waters"; apparently because the dolphin was a stationary object, located some thirty feet away from the nearest dock. It was not floating in the water, and was not connected to or part of a dock, pier or wharf.[1] Respondents

[1] Respondents' cross-examination attached some importance to the fact that at the time of the injury, Mr. Freer's body did not touch the water. However, as noted in *Dixon v. Oosting*, 238 F.2d 25, 29 such contentions, which would strictly construe this Section, "needs no citation of authority to refute."

further contend that the injury did not occur on navigable waters because it did not take place in an area customarily used by an employer in loading, unloading, repairing or building a vessel. Respondents' latter point, even if it were necessary to decide this issue, is contrary to the evidence which shows that the area where the injury occurred was in fact used to unload cargo from ocean-going vessels; and that the D-H barge working on the dolphin had to be moved periodically to permit the vessels to use the existing docks.

Respondents' former point rests upon a reading of Section 3(a) which would set up two tests before the injury could come within the purview of that section. One, the injury would have to occur on navigable waters. Two, it also would have to occur on an adjoining pier, wharf, dry dock, etc. which was situated on navigable waters. I do not read the Act in such a manner, nor do I believe it can be read that way. All that is required under this section is that the injury occur on navigable waters *or* on an adjoining pier, wharf, etc.. While common sense dictates that this is the manner in which the Act is to be construed it is enough that in this instance common sense is supported by the legislative history of the Act. In the Report of the House Education and Labor Committee in the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (House Report No. 92-1441) the Committee specifically stated, in regard in the expansion of the area in which federal compensation would henceforth be paid:

> "The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred *either* upon the navigable waters of the United States *or* any adjoining pier, wharf, dry

dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel." [Emphasis supplied] 3 U.S. Code Cong. and Adm. News, 4698, 4707-08 (92nd Cong., Q.O. Sess.) (1972).

In this instance, there is no question that the waters on which the injury occurred, were, in fact "navigable." The depth of the water was approximately thirty to thirty-five feet, deep enough to permit its frequent use by ocean going vessels, and the dolphin in question was to aid said vessels in unloading their cargo. Also see, *Dixon v. Oosting, supra,* and *Traveler's Insurance Company v. McManigal,* 139 F.2d 949.

2. The second issue to be decided is whether the decedent was an "employee" as defined by the Act.

This is the most troublesome issue presented and its determination is crucial to the Claimant's case. All three parties have presented excellent briefs on this issue which deal at great length with the history of the Longshore Act, its 1972 amendments, the legislative history, and the cases. It is a matter of record that the Benefits Review Board and the courts are in disagreement as to the kinds and types of employment the Act is intended to cover. See *Bradshaw v. J. A. McCarty, Inc.,* 3 BRBS 195. In view of this it may be helpful to set forth the factors which I believe are relevant to understanding and deciding this issue.

Under the present Act, every individual engaged in maritime employment, with narrow limited exceptions,[2] is entitled to compensation benefits for death or disability if the injury causing the same occurred on the navigable waters of the United States or specified adjoining structures which are customarily used in loading, unloading, repairing or building a vessel.

Prior to the 1972 amendments to the Act, it was not necessary that the employee be engaged in maritime

[2] E.g., Seamen.

employment at the time of injury. It was necessary only that the accident occur on navigable waters and that the employer of the injured employee have *other* employees who were engaged in maritime employment. See, *Weyerhauser v. Gilmore*, 3 BRBS 140; *I.T.O. Corp. v. Adkins*, 3 BRBS 88; *Benedict on Admiralty*, Vol. 1A, Section 18, p. 2-6, (1973 ed.). However the 1972 amendments changed the basis upon which an individual becomes entitled to compensation. Since 1972 the injured individual must be engaged in maritime employment (even if his employer has other employees who are engaged in maritime employment) and the injury must take place on navigable waters or on the adjoining areas specified in the 1972 amendments. The effect of these amendments was to extend the geographical location in which the injury was compensable. However, it restricted such compensability to those individuals who were actually engaged, at the time of the injury, in a specified type of employment, i.e., maritime employment in the specified location. See, *Benedict on Admiralty*, *Weyerhauser v. Gilmore*, and *I.T.O. Corp. v. Adkins*, *supra*.

Thus, having found that Mr. Freer's death occurred in a geographical location covered by the Act, i.e., navigable waters, it must now be determined if the work he was doing in that area can be properly classified as maritime employment. Section 2(3) of the Act states:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

Neither the Act *nor* its legislative history defines what Congress meant by "maritime employment." However, it is clear that certain types of employment are clearly included within this term. They are longshoremen, persons

engaged in longshoring work even if they are not designated as longshoremen, harbor workers, ships repairmen, shipbuilders and ship-breakers. If an individual is engaged in one of these occupations at the time of the injury, assuming it takes place in the specified geographical location, it is unnecessary to attempt to decide if such employment is "maritime employment" since the Act states that it is. See *Benedict on Admiralty*, *supra*, Section 16, p. 2-3. The Claimant's brief argues that I should find that Mr. Freer's duties as a pile butt, engaged in building and extending a pier, made him a "harbor worker" under the Act. I disagree. A reading of the history of the Act and the cases indicates that the term "harbor worker" does not include those individuals who, as here, are engaged in *Constructing* a dock, pier wharf, building, railway, etc., just because it is on or adjoining navigable waters. The term appears to be limited to those individuals whose work is concerned with loading and unloading vessels or related work. See, e.g., *Merrit-Champman v. Willard*, 189 F.2d 791, 792. In any event, it is unnecessary to find Mr. Freer to be a "harbor worker" in order to decide this issue, and it only results in confusing the issue of maritime employment.

Respondents, on the other hand, cite the legislative history of the Act and the *I.T.O.* and *Weyerhauser* cases as proof that Mr. Freer's employment was not maritime in nature and therefore not within the coverage of the Act. First, with respect to the legislative history, I believe that reference to it to decide this particular point casts little light on the subject. For example, in the Respondents' opinion one particular portion of the legislative history is all-important. It states:

> "[T]he Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered nor would purely clerical employees whose jobs do not require them to participate

in the loading or unloading of cargo . . . . " Committee on Labor and Public Welfare S. Rep. 92-1125 at 13, 92 Cong., 2d Sess. (1972).

In addition, Respondents point out, and correctly so, that the Court in *Weyerhauser* and *I.T.O.* relied upon this particular issue because it is only concerned with Congressional intention insofar as the amendments were designed to extend coverage to employees on shoreside areas. ("Dry" navigable waters as opposed to "wet" navigable waters). Indeed the heading of this particular portion of the history is entitled "Extension of Coverage To Shoreside Areas."

The legislative history does not address itself to what Congress meant was to constitute "maritime employment" on navigable waters; it only expressed itself as to what it meant by maritime employment on the extension of the term to the adjoining shoreside areas. Thus, the legislative history is helpful if one wishes to know if Congress intended to cover certain types of employment on piers, wharfs, adjoining land areas, etc., but it tells nothing about what it meant to cover on "wet" navigable waters.[3] In the absence of an explanation of Congress' intention as to the kinds of employment it intended to cover on navigable waters I am constrained to follow the long history of cases defining what constituted maritime employment on navigable waters. See e.g., *Benedict, supra*, Section 19, p. 2-8; 2-10. A reading of these cases indicate that almost every possible kind of employment is considered "maritime employment" if it took place on navigable waters.

It is for these reasons that I do not believe the *Weyerhauser* and *I.T.O.* cases, *supra*, are in point. *I.T.O.* was concerned with forklift operators who were injured in warehouses and piers as opposed to "wet" navigable waters. The Court, relying upon the legislative history, decided that this type of employment was not "maritime"

[3] Webster's New Collegiate Dictionary, defines navigable as "Capable of being navigated; specif: a. Deep enough and wide enough to afford passage to vessels." 1951 Edition, p. 561.

basing its decision on a "point of rest" theory. It is not necessary to decide if the majority or minority opinion in *I.T.O.* correctly interprets the statute with respect to the shoreside extension of coverage under the 1972 amendments for the reason that the majority opinion simply does not address itself to the fact situation before me. Mr. Freer was injured on navigable waters and not on a dock or warehouse, and his duties did not involve unloading cargo. As for *Weyerhauser*, it appears from that decision, that the employee may have been on navigable waters at the time of the injury, but the Court found that his duties as a pond man, sorting logs and feeding them into the mill for processing, did not constitute maritime employment. Once again, this decision, based as it is on duties unlike those performed by Mr. Freer, is not inconsistent with holding that he was engaged in maritime employment at the time of his death.

After all, the fact that one is working on navigable waters at the time of the injury does not mean that, ipso facto, the employment is maritime. It is possible that some types of employment on navigable waters are not, in fact, maritime employment; however, as *Benedict* points out nothing is more maritime than the sea or other navigable waters and all employment thereon should be considered or presumed to be maritime employment. See *Benedict*, *supra*, Section 17, p. 2-4; 2-5. Also, see *I.T.O.*, *supra*, 3 BRBS 88, 111.

In *Weyerhauser*, the Court apparently felt this consideration or presumption was overcome by the very nature of a pondman's duties. In this case, the very nature of Mr. Freer's duties, i.e., building dolphins, which are used, according to the Respondents, "to keep the ship tied up at the dock physically away from the dock" (Respondents' Brief, p.5) would make his duties, since they are "directly concerned with a maritime purpose," maritime even in the

absence of any presumption.[4] *Peter v. Arried*, 325 F. Supp. 1361, 1365; 463 F.2d 252. The *Weyerhauser* decision is further confused by the statement that before one is entitled to compensation his employment must subject him to "the perils of the sea in an unseaworthy vessel recognized under maritime law" and "must have a realistic relationship to the traditional work and duties of ship service employment." If, in fact, this language, if binding, would exclude Mr. Freer from the Act's coverage, then the Court's holding that for one to be eligible for benefits one's work "must have a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters" would place him squarely back within the scope of the Act. I do not believe it is necessary to pick one of the above contradictory paragraphs in order to reach a decision on this issue. I find that the duties Mr. Freer was performing at the time of his death (building docking facilities for ocean-going ships) constituted maritime employment,[5] and that he is an "employee" under Section 2(3). See *Sharp v. Pacific Gas v. Electric Company*, 2 BRBS 381, 384; *Melson* v. *Bay State Dredging & Contracting Co.*, 62 F. Supp. 482, 485 (D. Mass. 1943); *Morrison-Knudson Company v. O'Leary*, 288 F.2d 542 (C.A. 9,1961); *Travelers Insurance Co. v. McManigal*, 139 F.2d 949 (C.A. 4, 1944); *Ryan v. McKie Co.*, 1 BRBS 221; *Radcliff v. Henderson*, 138 F.2d 549.

3. Is D-H an "employer" within the meaning of Section 2(4) of the Act?

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[4] In *I.T.O.*, Judge Craven states employment is presumed to be maritime under Section 20(a) of the Act. (3 BRBS 88, 114) I agree. In this case, the application of the presumption is appropriate, but perhaps superfluous, since the duties have been shown to be maritime in nature. I would note, however, that Respondents have failed to introduce substantial evidence that Mr. Freer was *not* engaged in maritime employment. As such, if the presumption were necessary, Respondents' evidence is not enough to defeat it.

[5] The fact that on many other occasions Mr. Freer did not engage in maritime employment is irrelevant. As the Court noted in *I.T.O.*, "[T]he status of his employment is to be determined as of the time of his accident—not by what his previous duties may have been or by what his duties are when he accepts sporadic overtime assignments." 3 BRBS 88, 106.

The cases on this point are consistent and uniform. If one is found to be an "employee" under the Act, it follows that the individual or company he works for is an employer. See *Morgan v. Ingalls Shipbuilding Corporation, Division of Litton Systems, Inc.*, BRB No. 75-159 (March 19, 1976); *Harris v. Maritime Terminals, Inc.*, BRB No. 74-178 (Feb. 3, 1975); *I.T.O. Corp. v. Adkins, supra.*

4. Are the Respondents' subject to a ten percent penalty for failure to file a notice of timely controversion?

D-H knew of Mr. Freer's death as of May 27, 1974. A notice of controversion was not filed until October 31, 1975. Section 14(e) of the Act provides that when any installment of compensation payable without an award is not paid within fourteen days after it is due, there shall be added a ten percent penalty unless the employer filed a notice of controversion pursuant to Section 14(d), or payment is excused by a showing that the payment could not be made as a result of conditions beyond the employer's control. The Respondents' belief, as in this case, that they were not subject to the Act, even if in good faith, does not excuse them from the application of 14(e). See *Ryan v. McKie Co.*, 1 BRBS 221 (Dec. 10, 1974); *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 27; *Rasmussen v. Geo Control Inc.*, 1 BRBS 378; *McCabe v. Hall Builders, Inc.*, 1 BRBS 290.

In view of Respondents' failure to comply with Section 14(d), a ten percent penalty against them is mandatory under Section 14(e). However, as noted in *Toriaff v. Triple A Machine Shop*, 1 BRBS 465, 471 (May 14, 1975) and *Caramagna v. Campbell Machine, Inc. and Leatherby Insurance Co.*, 1 BRBS 446 (May 2, 1975), the penalty applies to the difference between the amount of compensation paid and the amount of compensation found to have been due on the specified date.[6] In this case it is undisputed that since May 30, 1975 the Carrier has been making payments to Mrs. Freer at the rate of $119.00 per week.

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[6] In addition, a six percent interest charge is mandatory. *Ryan, supra*, 1 BRBS 221, 229.

The Claimant makes an additional argument concerning the Respondents' failure to file a notice of controversion. It is that by Respondents' failure to comply with Section 14(d) it precludes notice to the injured employees of their rights under the Act. The Claimant argues that the conscious failure to file a notice under the Act misleads employees into accepting lesser benefits under State statutes. The Claimant states that the only proper remedy in this situation is to estop the Respondents from denying jurisdiction. One, the record does not support the assertion that Respondents' failure to file a notice of controversion was conscious and deliberate as contended by the Claimant. Two, even if it were, I have no authority to impose such a sanction nor does Claimant cite any authority for this proposed action. Three, the issue is academic since this decision holds that the Respondents are subject to the Act.

5. Should death benefits under Section 9 be limited by the maximum weekly amount provided for disability benefits in Section 6(b)(1)?

The Benefits Review Board has previously held in ***Rasmussen***, *supra*, that death benefits are not limited by the provisions of Section 6(b)(1). The Respondents ask, in order to avoid a multiplicity of litigation, that if I find for the Claimant I reserve my decision on this issue since ***Rasmussen*** is on appeal to the Ninth Circuit. I have no such authority and would note that in *Sharp*, *supra*, which was decided after ***Rasmussen***, the Benefits Review Board again applied the doctrine it set forth in the latter case.

6. Was the decedent a member of a crew of a vessel under Section 3(a)(1) and thereby not entitled to compensation?

Section 3(a)(1) states:

No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Some of Mr. Freer's work was performed on a crane barge. The barge had no engines and was moved either by tugs or by taking up anchor lines. The barge was moved periodically to permit arriving vessels to use the docks. No one stayed on the barge; there were no living quarters or cooking facilities.

The test of whether an individual is a member of a crew under the Act is whether (1) the vessel is in navigation; (2) the worker had more or less permanent connection with the vessel; and (3) the worker was aboard primarily to aid in navigation. *Bellomy v. Union Concrete Pipe Co.*, 297 F. Supp. 261 (S.D. W.Va. 1969), *aff'd.* 420 F.2d 1382 (4th Cir. 1970), *cert. denied*, 400 U.S. 904, 91 Sup. Ct. 144 (1970); 400 U.S. 904, 91 Sup. Ct. 144 (1970); *Ryan v. McKie Co.*, 1 BRBS 221, 227.

In my opinion Mr. Freer failed to meet two of these tests. He did not have a permanent connection with the barge. He neither ate nor slept on the barge. In addition, he was not aboard the barge primarily to aid in navigation. See *Ryan, supra.* Anything he did in this regard was incidental to his primary work as a pile butt. As the Court noted in *South Chicago Coal & Dry Dock Co. v. Bassett*, 309 U.S. 25, 60 Sup. Ct. 544, 549, "They were persons serving on vessels, to be sure, but their service was that of laborers ... and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation." Moreover, it is not without significance that at the time of his death Mr. Freer was not even aboard the barge but instead was standing on the dolphin.

7. What were Mr. Freer's average weekly wages at the time of his death?

The record shows that the decedent worked a total of 195 days in the year prior to his death. Mr. Freer was off work for a three week period in June-July, 1974, when his union went on strike and from December 22, 1974 through February 15, 1975. In December 1974 he left his job with D-H, went on vacation, and visited his relatives for two weeks. After he returned from this visit he attempted to

resume employment with D-H but it had no openings. In late February 1975 he was hired for the Pittsburg job. From January through February he attempted to obtain employment through the union but *no work was available.* The Claimant contends that the proper method to obtain Mr. Freer's average weekly wage is under Section 10(a) of the Act. Section 10(a) applies only when the employee works for "substantially the whole of the year immediately preceeding his injury." In this instance the decedent worked thirty-nine out of a possible fifty-two weeks. This is not "substantially the whole of the year" within the meaning and purpose of Section 10(a). To adopt the Claimant's proposed method of deducting Mr. Freer's "average weekly wage" would be an injustice to the employer. As stated in *Gunther v. United States Employees' etc. Comm.*, (C.C.A.) 41 F.2d 151 and cited with approval by the Court in *Andrew F. Mahoney Co. v. Marshall*, 46 F.2d 539, 541: "In these provisions [Sections 10(a), (b), (c)] Congress had in view the protection of *both* the *employer* and the *employee*, or the latter's beneficiaries" (emphasis supplied). On the other hand, if Mr. Freer had worked 360 days during the course of the year prior to his death, it would be unfair to him to determine his average weekly wage on the basis of Section 10(a); which would reduce the number of work days to, at most, three hundred. As the Court stated in *Mahoney, supra*, p. 544, "[Section 10(a)] cuts both ways: it cannot be applied to the prejudice of an employee who has averaged substantially more than three hundred days, nor to the prejudice of an employer, where the service is substantially less."

It is clear from a reading of the cases concerning Section 10 that subsections (a) and (b) "cannot be reasonably and fairly applied to an industry where employment is causual, irregular, seasonal, intermittent, and discontinous. *Surely it is not reasonable or fair to apply subdivisions (a) or (b) when to do so would result in ascertaining a mere theoretical earning capacity, having no regard to the actual facts of the case, but which would award arbitrarily to an injured laborer disability com-*

pensation in excess of what he was able to earn if at work . . . Compensation acts, to be within constitutional limits, must not be arbitrary, unreasonable or fundamentally unjust or oppressive." *Mahoney, supra*, 56 F.2d 355, 359. *O'Hearne v. Maryland Casualty Co.*, 177 F.2d 979, 982; *California Ship Service Co. v. Pillsbury*, 175 F.2d 873, 876.

In this instance the record clearly shows that Mr. Freer's work was not of a continuous nature so as to bring it within Section 10(a). Section 10(b) cannot be applied, in addition to the reasons cited above, because there is nothing in the record to indicate other pile butts' average earnings in the year preceding Mr. Freer's death. (The copy of the collective bargaining agreement of his union [Cl. Ex. 18], does not disclose the average annual earnings of pile butts, but only their hourly compensation, *if employed*).

This, then, is a fact situation which falls under Section 10(c). Under this section, "The amount of annual earnings is not reached by multiplying the employee's daily earnings by any arbitrary figure, but by ascertaining from the evidence what his earning capacity in fact was." *Mahoney, supra*, 46 F.2d 539, 543. The Claimant urges that the days that Mr. Freer was off work during the time his union struck and the time he was on vacation and unable to obtain work, should be counted in arriving at Mr. Freer's average weekly wages.

The decision as to whether the inclusion of these days is reasonable and fair turns on what Section 10(c) means by "earning capacity." The cases are of one mind on this issue. "*Earning capacity means fitness and readiness to work, considered in connection with opportunity to work; and fitness and opportunity must go hand in hand.*" *Mahoney, supra*, 56 F.2d 75,78. "The readiness, willingness and fitness of the claimant for work does not require the employer to insure work." *Mahoney, supra; Johnson v. Britton*, 290 F.2d 356, 358. Under this test, the time that Mr. Freer was on vacation and unable to find work cannot, under the circumstances of this case, be properly included

in arriving at his annual earning capacity. In these instances, *he either lacked the willingness or the opportunity*. In regard to that period of time that his union was on strike the precedent is a little less clear.

In *Toriaff, supra*, the claimant was employed from 1967 through 1972 as a machinist and had a long history of regular work. In 1971 and 1972 there was a longshore strike and the claimant was unable to work substantially the whole of the year preceeding the date of his injury. The respondents urged that Section 10(c) be used in the computation and contended that the claimant's earnings during 1971 and 1972 were an accurate and fair reflection of claimant's wage earning capacity. The Benefits Review Board disagreed, and affirmed Judge Howder's application of Section 10(b). It held that Section 10(c) "would only result in a distorted and unfair approximation of claimant's probable future earning capacity since claimant's earnings during the period of the strike were abnormally low." *Toriaff*, p. 470. I am in complete agreement with this decision. However, I do not believe that it requires, that in all cases, time lost by strikes must be used in computing annual earning capacity. Obviously, where as in *Toriaff*, the record indicates a long, regular work history, it would be unfair to the claimant to use a period of time in which a long strike occurred "to arrive at a fair and reasonable approximation of claimant's future wage earning capacity" *Toriaff, supra*, p. 469.

Where, as here, a short strike occurs which, when compared to the claimant's previous annual earnings, does not distort the claimant's previous annual earning capacity, I do not believe it should be used to compute such capacity.[7] A strike, by its very nature, precludes an employee from having a "willingness to work."

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[7] Mr. Freer's earnings records are in the record as Claimant's Exhibit 21. Claimant's Exhibit 22 received on March 2, 1976, is herewith received into evidence.

If this is inconsistent with *Toraiff*, I can only repeat what the Court stated in *Mahoney*, *supra*, 56 F.2d 75, 78 in distinguishing its action from a prior decision. "But the language of that case, like the language of all cases, must be taken and understood in the light of the facts of the case in which the language is employed."

When the hours that Mr. Freer worked, for the two year period prior to the accident, from April 1973 through May 1975 are examined it is apparent that in the time period from June 1973 through May 1974 Mr. Freer worked 1850.75 hours. In the period from June 1974 through May 27, 1975 he worked 1667.50 hours. (The hours do not accurately reflect work days because of overtime on some days and short hours on others.) Thus, in 1973-74 he worked ten percent more hours than he did in 1974-75. In my opinion, the only fair method to find the average annual earning capacity, based on this record, is to average this difference (approximately) between the two years and give Mr. Freer five percent more work days in the year prior to his death. This amounts to two hundred and five work days.

The Claimant also contends that travel expenses and pension payments should be included in determining average weekly wages. Section 2(13) defines wages as "the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of injury, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer."

The Claimant contends that travel pay and pension payments are so closely akin to "board" and "lodging" as to constitute "other similar advantage received from the employer." I disagree. Travel pay is obviously reimbursement for expenses; it is not payment for "the service rendered." For example, under the union contract, Mr. Freer was compensated at a specified hourly rate when performing specified duties at the job site. The contract

did not specify any hourly rate of compensation for time spent traveling to and from the job location; only mileage expenses. Moreover, it is noted that the union contract on travel expenses specifically states: "Such pay shall be excluded from the wages of the employee and shall be paid to him weekly by separate check." (Cl. Exhibit 18, p. 21) Thus, it would appear that the intent was to exclude this money from Mr. Freer's wages; perhaps to reduce his tax burden.

It is noted that this same agreement, in regard to pension payments, directs the employer to pay such payments to the Carpenter's Pension Trust Fund of California, not the employee. (*Ibid.*, p. 26) This payment, which by its nature is not capable of being converted to the immediate advantage of the employee, is not a "similar advantage" to "board, rent, housing, lodging" within the meaning of Section 2(13). The Claimant has cited no legal precedent for so construing the section nor does research disclose any precedent.

Therefore, Mr. Freer's average weekly wage is computed as follows: Mr. Freer, was paid $20,543.61 from May 28, 1974 through May 27, 1975. Of this sum, $2,309.25 represents travel expenses, leaving a net sum of $18,233.36. A division of this figure by 195 work days gives $93.51 as his average daily wage. This figure is multiplied by 205 to determine his "average annual earnings"; which is $19,169.55. Under Section 10(d) this amounts to an average weekly wage of $368.64.

Claimant's counsel has submitted an application for an attorney's fee pursuant to 20 C.F.R. Section 702.132 and Section 28 of the Act. The application states 112.90 hours of attorney's time was spent in the prosecution of this claim. In addition, 50.65 more hours were expended by legal and research assistants. The application asks for compensation for the attorney's time at $70.00 per hour and $20.00 and $10.00 per hour for each of the assistants. This amounts to $8,627.00. Further, it asks $136.40 for various witness fees and mileage. Counsel contended,

however, that a fair and reasonable fee in this case is $30,000.00 and that fee is requested. Counsel points out that this is an important, difficult case, having far reaching impact upon large numbers of construction workers. He further states that if the decision is favorable, Mrs. Freer and her three children will receive approximately $718,000.00[8] as compared to $45,000.00 under the California statute. Thus, in his opinion, a fee of $30,000.00 is justified. The Respondents opposed the granting of the requested fee stating the hours expended on this case appear to be excessive, and that basing the requested fee on the amount of compensation awarded is much like a contingency fee which is not allowable in these proceedings.

While it is true that the total award will result in a substantial sum, it is noted that such computations are not entirely accurate. Unlike sums awarded for damages, negligence, etc., the compensation awarded is conditioned upon the widow and her children living to certain ages, and in the case of the widow, further conditioned upon her not remarrying. In short, it is not a lump sum payment to which the parties take title, but it is conditioned, to a large extent, upon life and death being both fair and patient – two attributes these fates seldom display.

I have taken into consideration the complexity of the issues, the work performed, the result obtained, the quality of the services performed, and the fees requested and approved for cases similar to the instant matter, and I find the sum of $8,627.00 is a reasonable fee for the legal services rendered; with an additional $136.40 to cover the costs of witness fees and mileage.

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[8] While Mrs. Freer's claim is being allowed, the total amount should be approximately $500,000.00.

FINDINGS

Based on the evidence of record, my observations of the witnesses and stipulations of the parties I make the following findings of facts and legal conclusions.

1. On May 27, 1975, David W. Freer was employed by Duncanson-Harrelson. On that date he died from an accident, arising out of and in the course of his employment with Duncanson-Harrelson. This accident occurred on the "navigable waters" of the United States. Timely notice of the death was given to Duncanson-Harrelson. A notice of controversion was not filed until October 31, 1975.

2. The work activity being performed by Mr. Freer at the time of his death, was such, as to properly classify him as an "employee" within the meaning of the Act. Mr. Freer's duties did not make him a master or member of a crew under Section 3(a)(1).

3. Duncanson-Harrelson is an "employer" within the meaning of the Act. All of the captioned parties are subject to the Act.

4. Nancy A. Freer and her three minor children Deborah Ann, Stephanie Adele and David Andrew are properly classified as a widow and surviving dependent children under the Act.

5. Since May 30, 1975 Employers Mutual Liability Insurance has paid Mrs. Freer $119.00 per week.

6. At the time of his death Mr. Freer's average weekly wage was $368.64.

7. W. Martin Tellegen, Esquire, is entitled to receive a legal fee of $8,627.00. Said fees are the fair and reasonable value of legal services provided to the Claimant. Mr. Tellegen's legal fee is to be supplemented by an award of reimbursable expenses in the amount of $136.40.

ORDER

1. Respondents shall pay the Claimant and her minor children, subject to the provisions and limitations of the Act, a death benefit based on an average weekly wage of $368.64.

2. The amount of death benefits due and payable from May 27, 1975 to the date of this Order shall be paid forthwith. Interest on accrued payments due Claimant shall be paid at the rate of six percent per annum computed from the date each such payment became due and the total amount of such payments as are due and owing, shall be paid forthwith.

3. Respondents shall pay the Claimant, pursuant to Section 14(e) of the Act, an amount equal to ten percent of each unpaid compensation installment that is due and payable.

4. Respondents are entitled to credit, in paying the above ordered death benefits, interest and penalty, for all payments previously made to the Claimant.

5. Respondents shall pay directly to W. Martin Tellegen, Esquire, the lump sum of $8,627.00 for legal services rendered to the Claimant. Respondents shall reimburse Mr. Tellegen for expenses in the amount of $136.40.

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FAUSTER VITTONE
Administrative Law Judge

Dated: May 27, 1976
Washington, D.C.

APPENDIX E

RELEVANT STATUTES

28 U.S.C. 1254(1) Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

33 U.S.C. 902(13). Longshoremen's and Harbor Workers' Compensation Act.

(13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

33 U.S.C. §909 COMPENSATION FOR DEATH

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 906(b) of this title but the total weekly benefits shall not exceed the average weekly wages of the deceased.

33 U.S.C. §910. Determination of pay.

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and

two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

(e) If it be established that the injured employee was a minor when injured, and that under normal conditions his wages should be expected to increase during the period of disability the fact may be considered in arriving at his average weekly wages.

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after October 27, 1972, shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

40 U.S.C. 276a(b) Davis-Bacon Act.

(b) As used in sections 276a to 276a-5 of this title the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include—

(1) the basic hourly rate of pay; and

(2) the amount of—

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of appreticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of

such benefits: **PROVIDED**, that the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as sections 276a to 276a-5 of this title and other Acts incorporating sections 276a to 276a-5 of this title by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

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